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THE 1793  
CANADIAN  
LAW TIMES

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**Edited by**  
**E. DOUGLAS ARMOUR, Q.C.,**  
*Of Osgoode Hall, Barrister-at-Law.*

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VOL. XVII.

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TORONTO:  
**THE CARSWELL CO. (LIMITED), PUBLISHERS,**  
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## RESULTING TRUSTS.\*

**A** RESULTING trust is a trust which arises by operation of law, *whenever the legal estate in property is transferred without its being intended that the beneficial interest therein shall pass, along with the legal estate, to the transferee.*

Resulting trusts commonly arise :—

(1) *Where the owner of property parts with the legal estate therein without consideration, and without intending to part with the equitable estate.*

(2) *Where a person purchases property and pays the purchase money, and procures the legal estate therein to be conveyed to a third person, without there being anything further than the mere conveyance to indicate an intention to vest the beneficial interest in such third person.*

As a resulting trust is one which arises by operation of law, it is not affected by the provisions of the Statute of Frauds, for the 8th section of that Statute provides, "That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like

\* The following article consists of extracts from lectures delivered before the students of the Law School at Osgoode Hall.

force and effect as the same would have been if this Statute had not been made." The effect of this is that resulting trusts, relating as well to lands as to chattels, may be established by mere oral testimony.

Lord Eldon thus refers to the origin of this doctrine: "The rule was clearly settled by the decision in *Ventris*, (2 Ventr. 361), in the 35th of Charles II., about six years after the Statute of Frauds passed, that where one man advances the money to purchase an estate, but the purchase is made in the name of another, a trust arises for him who paid the money; that case forming an exception to the Statute of Frauds; and so long has that decision been followed that no rule can be represented as more clear and incontrovertible" (a).

Mr. Justice Burton, dealing with this doctrine, says:—"It is familiar law, not requiring a reference to authorities, that a trust will result in favour of the person who *pays the whole or a part* of the purchase money, when the title is taken to another; but it is subject to this qualification, that in the latter case the *trust must result from payment of an aliquot portion of the purchase money*, and be of an aliquot part of the whole interest in the property. The cestui que trust to whom the trust results must become by operation of law a tenant in common with the grantee of some aliquot part of the whole, and the older cases, which appear to decide that there can be no resulting trust in favour of one who advances only a portion of the purchase money, must be understood in that sense. So far back as *Wray v. Steele*, 2 V. & B. 388, the doctrine was clearly established that a trust may result, where the cestui que trust advanced only a portion of the purchase money, but in that, and in all other cases that can be found on the subject, the trust was of an aliquot part of the estate, there one-third, to the party who had advanced one-third of the purchase money. Lord Eldon points out that the case of *Crop v. Norton*, 2 Atk. 74, was misconceived when it was cited as an authority for the rule that a trust could not

(a) *Wray v. Steele*, 2 V. & B. 390.



result from the payment of part of the purchase money. But he held that the principle was that the *whole consideration for the whole estate, or for the moiety or third, or some definite part of the whole, must be paid to be the foundation of a resulting trust*, and that the contribution or payment of a sum of money generally for the estate, where such payment does not constitute the whole consideration, does not raise a trust by operation of law for him who pays it" (b).

This passage would appear to indicate that there might be a payment of a sum of money which would not constitute an aliquot part of the whole purchase money, but I am unable to conceive of any sum of money which would not constitute one or more aliquot parts of any larger sum of money. The idea that is intended to be conveyed is this, that, in order to give rise to a resulting trust, the portion of the purchase money in respect of which the trust arises must be ascertained and definite, and no resulting trust will arise in respect of an indefinite contribution to the purchase money.

The point which is intended to be covered by Mr. Justice Burton is stated with greater accuracy by Vice-Chancellor Strong, who says: "There can of course be no doubt but that a trust results where two or more persons in determined proportions advance the purchase money of land which is conveyed to one, as was decided in *Wray v. Steele*, 2 V. & B. 388. *Where, however it is impossible to determine the proportions in which there has been contribution to price, as here, it is impossible that there can be any trust by operation of law, for the Court cannot determine the interest.* Upon this authority, if any is needed, is clear. I refer to *Crop v. Norton*, 2 Atk. 74, decided by Lord Hardwicke, a case which seems to be exactly in point and has never been overruled, and to *Re Ryan*, 3 Ir. Rep. Eq. 222, in which *Crop v. Norton* was expressly followed" (c).

(b) *Sanderson v. McKercher*, 13 App. R. 574-5.

(c) *Wilde v. Wilde*, 20 Gr. 536-7.

In *Wilde v. Wilde*, V.-C. Strong said that it was impossible to determine the proportions in which there had been contribution upon the following state of facts: A father and son lived together on the same farm, of which they obtained a lease in their joint names, the son having for several years, owing to the infirm state of his father's health, the entire management of the farm; and any moneys he received from the sale of the produce thereof he was in the habit of handing over to his mother for safe keeping, thus forming as it were a common fund. Subsequently he effected a purchase of the farm in his own name, when he paid \$1,000 on account of the purchase money, derived partly from private funds and partly from the fund held by the mother, and gave a mortgage with the usual covenants for the residue of purchase money, on which he subsequently made a payment of \$1,520; \$1,000 of which he borrowed from his wife, the balance being made up partly of funds of his own, partly of funds obtained from the common purse. The father filed a bill in support of his claim that the purchase had been made for his benefit and the benefit of the son and his brother; but in so far as the claim was based upon the doctrine of resulting trust it was held to fail, because the purchase money had not been advanced in ascertained or determinate proportions.

The doctrine of resulting trusts applies to personal property as well as to realty (*d*).

It is a general rule that where there is a conveyance, devise or bequest to a person for a purpose which fails, or partially fails, or of an estate with a declaration of trust as to a portion thereof, and nothing is said about the residue, there will be a resulting trust, as to the estate or portion of the estate which is not required to fulfil the trust, e.g., settlement of property in trust to expend \$1,000 annually in educating the settlor's two grandchildren Robert and John; first John dies and then Robert dies; the property

(*d*) *Sidmouth v. Sidmouth*, 2 Beav. 454; *Rider v. Kidder*, 10 Ves. 366; *Ex p. Houghton*, 17 Ves. 253.

conveyed in trust yields \$1,500 per year; first, \$500 surplus results; secondly, John's \$500 results; thirdly, the balance results (e).

All that we have been saying is based upon the assumption that no consideration has been paid by the grantee for the estate, or for the particular portion thereof, which is in question, and *the mere payment of a nominal consideration will not take the case out of the general rule* (f).

"If two persons joining in a purchase take the conveyance not in the name of a *stranger* or of *one* of themselves, but in the name of *both* of themselves, as *joint tenants*, then a distinction must be observed between an *equal* and an *unequal* contribution" (g).

Should the contribution of the parties be *unequal*, then in all cases a trust results to each of them in proportion to the amount originally subscribed (h).

If the contribution is *equal*, and the conveyance upon its face purports to convey to them as *joint tenants*, they hold as joint tenants, and the benefit of survivorship follows as of course (i).

But if they take a conveyance to themselves as *tenants in common*, they will hold as such, whether the payments are made in equal or in unequal shares, and each tenant in common will have a share in the property in proportion to the purchase money advanced by him (j).

"If two persons join in *lending money upon a mortgage*, equity says that it could not be the intention that the interest in that should survive. Though they take a joint security, each means to lend his own and take back his own" (k).

(e) Lloyd v. Spillett, 2 Atk. 150; Mapp v. Elcock, 2 Phil. 793; 3 H. L. C. 492; Read v. Stedman, 26 Beav. 495; Pilkington v. Boughey, 12 Sim. 114.

(f) Sculthorpe v. Burgess, 1 Ves. 92.

(g) Lewin on Trustees (9th ed.) 172.

(h) Rigden v. Vallier, 3 Atk. 735.

(i) Robinson v. Preston, 4 K. & J. 505.

(j) Bone v. Pollard, 24 Beav. 288.

(k) Per Lord Alvanley, in Morley v. Bird, 3 Ves. 631.

There is a distinction to be observed with regard to the application of the doctrine of resulting trusts between a case of the *devise of lands charged with debts* and the case of a *devise of lands upon trust to pay debts*.

Lord Eldon, referring to this distinction, says: "If I give to A. and his heirs all my real estate, *charged with my debts*, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is *upon trust to pay my debts*, that is a devise for a particular purpose, and nothing more; and the effect of these two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose; with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not, in their execution, exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir; but where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee; as it is intended to be given to him" (l).

"The trust must result, if at all, at the instant the deed is taken and the legal estate vests in the grantee. No oral agreement and no payments before or after the title is taken will create a resulting trust unless the transaction is such at the moment the title passes" (m).

"After the legal title has once passed to the grantee by deed, it is impossible to raise a resulting trust so as to divest that legal estate by the subsequent application of funds in satisfaction of unpaid purchase money. The resulting trust must arise, if at all, at the time of the execution of the conveyance" (n).

(l) King v. Denison, 1 V. & B. 272-3.

(m) Sanderson v. McKercher, 13 App. R. 575-6.

(n) Per Chancellor Walworth, Rogers v. Murray, 3 Paige, 390.

"No doubt," says Mr. Justice Burton, referring to the facts of the case before him, "if money had been paid at the time it would have been competent to show by parol evidence that the money belonged wholly to one or was advanced by both in equal moieties, and *it would not be converted into an express trust or be any the less a resulting trust because of the parol agreement.* But as I understand the cases, *it would not aid the defendant to show that he made the payments subsequently in terms of the antecedent prior parol agreement*" (o).

The same learned Judge in the same case says: "It seems also to be well established, and follows as a necessary consequence from the principles governing this description of trust, that it must arise, if at all, at the time of the conveyance, and that the money or other consideration for the deed must then be paid, *or secured to be paid.* The trust then which results to the purchaser by operation of law must be a pure unmixed trust of the ownership and title of the land or estate itself, and *not an interest in the proceeds of the land, nor a lien upon it as security for an advance, nor an equity or right to a sum of money to be raised out of the land or on the security of it*" (p).

The proposition of Mr. Justice Burton, that a person is unable to establish a resulting trust by showing that after the making of the conveyance he paid for the property, pursuant to the terms of an antecedent parol agreement, made prior to the conveyance, cannot be said to be well established by authority; but, on the contrary, there is ample authority to show that the proposition is not one of general application.

Upon *Sanderson v. McKercher* being taken before the Supreme Court of Canada, Mr. Justice Strong said with reference to this point: "The law is clear that in order to raise a resulting trust the party asserting it must be able to show that at the time of the completion of the purchase

(o) *Sanderson v. McKercher*, 13 App. R. 576.

(p) *Ibid.* 575.

he either actually paid *or came under an absolute obligation to pay* the whole or some ascertained proportion of the price" (q).

A number of cases are collected in an article in 1 Harv. L. Rev. 185, which show that a resulting trust may be established by proof of payments made after the conveyance, provided that the conveyance and the payments are merely parts of one transaction, and that the payments relate back to the time of purchase, in the sense that the obligation to make them was then assumed, but the time for making them was postponed.

"In *Lounsbury v. Purdy*, 16 Barb. 376, the plaintiff paid part of the purchase money, and the defendant and another gave their note for the balance. The third party took the title in his own name. The agreement was that he should hold it in trust for the plaintiff, who afterwards paid the note. The Court discusses the facts, and treats the money and note as together the consideration which raised the trust in the whole land at the time of the purchase. Thus the note of the defendant and another is held to have been loaned to the plaintiff, and hence to have been held in trust before delivery for the plaintiff. Hence the resulting trust was sustained against the creditors of the person who had taken the legal title, and in this case the Court had laid down the same reasonable rule as follows: 'In this case there can be no doubt that whilst the grant was made to one person, the consideration therefor was paid by another. The defendant objects that but a part of the purchase money was paid when the deed was executed, and that if there could have been a resulting trust in favour of the plaintiff it would have been only *pro tanto*. But a note was given for the residue at the same time, in her behalf, by her then friends, and it is apparent that it was the understanding at the time when the conveyance was made. *It is not necessary that the consideration should be paid in specie, but anything representing it, coming from or in behalf of the cestui que trust, will be equally available*

(q) 15 S. C. R. 298.



to protect the beneficial interest. *The cases which declare the unavailability of subsequent payments have reference to such as are made pursuant to arrangements concocted after the conveyance had been made and consummated'*" (r).

Mr. Justice Burton further expresses his views as follows in *Sanderson v. McKercher*: "I am not prepared to say if the vendor had accepted from these two parties their separate notes for their several shares of the purchase money, the same result would not have followed as if the payments had then and there been made in money; on the contrary, I take it to be clear that it would. But I fail to see how the actual dealing here could have the effect of raising a resulting trust.

"There was a partial payment of money raised on the joint note of the parties, and if that had been of the whole purchase money no question could have arisen; the money, though borrowed, would have been borrowed on the joint credit to enable each to pay his moiety of the purchase money, and so applied. But how the delivery of joint notes to the vendor for the balance of the purchase money can have any such effect I confess myself at a loss to discover.

"If the plaintiff had been compelled to pay the whole of these notes without any assistance from McKercher, would any trust have arisen in favour of the latter? If not, the mere circumstance that they did in point of fact—if it had been a fact—pay the notes in equal moieties could not create it" (s).

The Supreme Court did not agree with this view of Mr. Justice Burton, and accordingly reversed the judgment of the Court of Appeal, on the ground that at the time of the completion of purchase both the plaintiff and the defendant were legally bound to the vendor to contribute to the payment of the purchase money (t).

"Equity looks to the consideration, and creates a trust in favour of him who furnishes it, regardless of whether

(r) 1 Harv. L. Rev. 188.

(s) 13 App. R. 578.

(t) *Sanderson v. McKercher*, 15 S. C. R. 296, 298.

such consideration be money, or labour, or property given in exchange" (u).

In *Williams v. Jenkins* (v), the plaintiff agreed with the defendant that the latter should obtain a mining lease in their joint names and for their joint benefit from one Palmer, and that the consideration for such lease should be the testing of the ore at the crushing mill of the plaintiff at the plaintiff's expense. Jenkins thereupon procured the lease, but took it in his own name alone. The ore was crushed at the plaintiff's mill at his expense, but Jenkins denied that the plaintiff had any interest in the lease, and asserted that he had obtained it for his own sole benefit. Vice-Chancellor Strong, in his judgment, says: "The agreement, having been made by Palmer in consideration of this test to be made at the plaintiff's mill, and at the plaintiff's expense, as was afterwards done, *the case is not distinguishable from one in which the price is actually paid by the principal in money*; so that there is here, in my opinion, a resulting trust."

The person who seeks to establish a resulting trust in his favour, by reason of his paying the purchase money, must show that the consideration was advanced by him *qua purchaser*, and not by way of loan, or in any capacity other than that of purchaser (w).

A person will not be permitted to seek to establish an express trust by his own evidence, and upon failing in that respect then to turn round and seek to establish a resulting trust having an effect substantially different from the express trust which he had set up.

Strong, V.-C., dealing with this question, says: "It is not only law upon authority, but law founded upon reasoning which commends itself to the understanding of everyone, that a man who asserts upon his oath that land which was conveyed to A. in trust for him for life, remain-

(u) *White v. Sheldon*, 4 Nev. 280.

(v) 18 Gr. 536.

(w) *Street v. Hallett*, 21 Gr. 255; *Sanderson v. McKercher*, 13 App. R. 580-1; 15 S. C. R. 296.

der to his son, shall not be permitted, in the face of his own evidence of such an actual trust, to fall back upon a legal implication of a trust of a totally different nature, one for himself absolutely, arising from the fact of his having paid all the purchase money. Resulting trusts owe their origin to feoffments without consideration expressed, and *without limitation of use to the feoffee*, in which case a use, which before the Statute of 27 Henry VIII. was nothing more or less than a trust, resulted to the feoffor: It was held that *the express limitation of a use to the feoffee prevented any such resulting use from arising*. From analogy to that rule it was the law before the Statute of Frauds that *if a special trust was intended and agreed there could be no resulting trust*, and by the express saving of the 8th section the Statute has not made any difference in law in this respect. Therefore, I consider the law to be that a man who seeks to enforce an express parol trust, which out of his own mouth and by his own mouth he proves to have been the declared intention of the parties, can never insist upon enforcing a trust by operation of law" (x).

From this it would appear that in event of a voluntary conveyance of land being made at the present day *unto and to the use of A.*, a stranger, there will be no resulting trust in favour of the grantor, because the limitation to the use of the grantee indicates an intention that the grantee shall take beneficially; but this appears to be open to some doubt (y).

It does not appear to be clear whether a grantor would be prevented from establishing a resulting trust in his own favour by the mere fact that he had attempted and failed to establish an express trust, the effect of which, if established, would have been identical with that of the resulting trust in question. The reasoning of the above extract from the judgment of Vice-Chancellor Strong would seem to negative any such right on the part of the grantor, but no decision upon the point was necessary in that case.

(x) *Wilde v. Wilde*, 20 Gr. 533-4.

(y) See 2 *Watson's Compend. Eq.* 1026.

A resulting trust will arise where the owner of property has conveyed it away without consideration and under mistake, as, for example, where the owner of real estate was apprehensive that he was about to be indicted for bigamy (which it turned out he was not liable to be), and he conveyed the said property to a grantee upon a parol agreement that it should be reconveyed to him when the difficulty had passed, it was held that there was a resulting trust in favour of the grantor (z).

If a conveyance or devise be made to a person *in trust without the terms of the trust being set forth*, or without the terms being set forth in such a way that the trust can be executed, there will be a resulting trust for the grantor, or for the estate of the testator, as the case may be.

Lord Chancellor Truro says: "Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares it imperfectly, or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded, and the next of kin take" (a).

An instance of a trust failing because of being too vague and indefinite to be enforced, is where a testator bequeathed personalty to be "applied for the benefit of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility" (b).

Where a person has a power to appoint either realty or personalty, and *in default of appointment the property is to go over to a third person*, and the person having the power exercises it by will, appointing the property to trustees in trust for some person who dies in the lifetime of the appointor, or appointing it for purposes which do

(z) *Davies v. Otty*, (No. 2) 35 Beav. 208. Compare *Manning v. Gill*, L. R. 13 Eq. 485, and *Street v. Hallett*, 21 Gr. 255.

(a) *Briggs v. Penny*, 8 Mac. & G. 557.

(b) *Kendall v. Granger*, 5 Beav. 300; *Re Macduff*, (1896) 2 Ch. 503, and see *Williams v. Kershaw*, 5 Cl. & F. 111; *Re Jarman's Estate*, 8 Chy. D. 584; *Tilden Will case*, 42 Alb. L. J. 44; 44 Alb. L. J. 368; and see 5 Harv. L. Rev. 389.

not exhaust the property, or for purposes which fail, *the property will not pass as in default of appointment, but will result to the estate of the appointor*, provided it appears that the appointor meant by the exercise of the power to take the property out of the instrument creating the power for all purposes, and not merely for the limited purpose of giving effect to the particular disposition which failed (c).

It was held in one case that this rule applied only in case of the appointment being *made to trustees* to hold for purposes which subsequently failed, and did not apply to a case where the appointment was made directly to the intended beneficiary without the intervention of trustees (d). But this is scarcely consistent with the subsequent decision in *Re Ickeringills Estate* (e).

*Property resulting to the estate of a deceased person* may pass as in case of intestacy, or may pass under a residuary clause in his will. Formerly a distinction was drawn between realty and personalty, as to the effect of a residuary clause thereon; but now, since the recent Wills Act, a residuary clause in a will sweeps every interest, whether real or personal, and whether previously undisposed of by the will or undisposed of in the events which happen (as, for example, in case of lapse).

As a general rule no resulting trust will arise where a man conveys away his property, though without consideration if the conveyance was made for the purpose of defeating the policy of the law.

Lord Eldon says:—"The plaintiff stating that he had been guilty of a fraud upon the law, to evade, to disappoint, the provision of the Legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest,

(c) *Re Pinèdes Settlement*, 12 Chy. D. 667; *Re Van Hagan*, 16 Chy. D. 18; *Willoughby Osborne v. Holyoake*, 22 Chy. D. 288.

(d) *Re Davies Trusts*, L. R. 18 Eq. 168.

(e) 17 Chy. D. 151.

between the two species of dishonesty the Court would not act; but would say 'let the estate lie where it falls' " (*f*).

Upon the same principle, the Court will not assist a person in recovering an estate conveyed by him for an illegal purpose, such as to enable the grantee to vote at an election, or sit in Parliament (*g*).

Lord Eldon says:—"The moment the purpose to defeat the policy of the law, by fraudulently concealing that this was his property is admitted, it is very clear he ought not to be heard in this Court to say that it is his property. In the case of a bill filed to have a re-conveyance of a qualification given by the plaintiff to his son to enable him to sit in Parliament, the purpose being answered, the bill was very properly dismissed by Lord Kenyon with costs" (*h*).

If a voluntary conveyance of land (though made for the purpose of giving the grantee a vote) be made *by a father to his son*, the conveyance will not usually be invalid, and usually no trust will result; but, upon application of the doctrines as to advancement, the conveyance will be presumed to be given from the bounty of the father, and the property will belong exclusively to the son (*i*).

Although the Court will not in general interfere where a conveyance has been made or a trust has been created for an illegal purpose, yet it will do so when the illegal design fails to take effect. Lord Romilly, M.R., says: "Where the *purpose for which the assignment was given is not carried into execution, and nothing is done under it*, the mere intention to effect an illegal object when the assignment was executed does not deprive its assignor of his right to recover the property from the assignee who has given no consideration for it" (*j*).

(*f*) *Mucklestone v. Brown*, 6 Ves. 69. See *Field v. Lonsdale*, 13 Beav. 78.

(*g*) *Groves v. Groves*, 3 Y. & J. 163.

(*h*) *Curtis v. Perry*, 6 Ves. 747. See *Brackenbury v. Brackenbury*, 2 J. & W. 391. *Cecil v. Butcher*, 2 J. & W. 573.

(*i*) *May v. May*, 33 Beav. 81. See *Alexander v. Newman*, 2 C. B. 122.

(*j*) *Symes v. Hughes*, L. R. 9 Eq. 479. And see *Platamore v. Staple*, G. Cooper, 250; and *Re Great Berlin Steamboat Co.*, 26 Chy. D. 616.

The case of *Re Great Berlin Steamboat Co.* was one in which B., for the purpose of enabling a company to have a fictitious credit in case of enquiries at their bankers, placed money with the bankers to the credit of the company which they were to hold in trust for him. Some of the money having been drawn out with B.'s consent, and the company having been ordered to be wound up while a balance remained, held, that B. could not claim to have the balance paid to him, as the purpose for which the money had been placed to the credit of the company had been effected.

*Platamone v. Staple* was a case in which A. had granted to the defendant without consideration a rent-charge issuing out of lands belonging to A., and it appeared that such grant was made for the purpose of qualifying the defendant to sit in Parliament, as he was about to become a candidate at the general election, and he had not such an estate of his own as would qualify him to sit in Parliament. A. died having devised and bequeathed his real and personal property to the wife of the plaintiff. This action was then brought to procure a reconveyance or cancellation of the said rent-charge, and an injunction to restrain the defendant from proceeding under it by action, distress or otherwise. The injunction was granted upon the ground that the defendant never became a candidate for a seat in Parliament, and therefore, although the grant was made for an illegal purpose, if it was intended that the defendant should not take beneficially, yet the purpose was never carried into execution, by reason whereof A. and those claiming under him were not estopped from relying upon the doctrine of resulting trust.

It is suggested in 1 White & Tudor's L. C. (6th ed.) 252, that although when a person purchases property and pays the consideration money, and procures the conveyance to be made in favour of a third person, a trust will in such case result in favour of the man who pays the purchase money, yet if a person owns property standing in his own name, and makes a voluntary conveyance thereof to a third

person, *prima facie* no trust will result, and it will be presumed that the grantee was intended to take beneficially; and the case of *George v. Howard* (*k*) appears to lend colour to this proposition; but the other cases cited by the editors of *W. & T. L. C.* do not appear to give any support to it.

Lord Justice James says incidentally in *Fowkes v. Pascoe* (*l*): "I will assume, further, that the implication of a resulting trust does arise as much in the case of a transfer as in that of a purchase of stock, *although that certainly is not the case with regard to a conveyance of land*" (*m*).

As supporting the right of a person who has made a voluntary grant of lands to a stranger to rely upon the doctrine of resulting trust, see *Davies v. Otty* (*m*). See also the cases collected in *Lewin on Trusts* (9th ed.) 151, note *b*.

*(To be concluded.)*

A. H. MARSH.

(*k*) 7 Price 646.

(*l*) L. R. 10 Chy. App. 348.

(*m*) See *Lewin on Trusts* (9th ed.), 152-3, as to the effect of these cases.

(*m*) 35 Beav. 208.

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## EDITORIAL REVIEW.

**The Occasional Notes and Index-Digest.**

The annual Index-Digest, which we have published ever since the year 1888, is a complete index-digest of all cases decided and reported in Canada during the year, excepting those of the Province of Quebec. From those who have familiarized themselves with it we have had flattering expressions of satisfaction with its value. For those who have not been in the habit of using it, we would again call attention to the fact that it is the only digest of Canadian cases. A digest containing the full head note of every case would be too large for the scheme of this journal. It would also require a great length of time, and a large expenditure of money, to compile it. From inquiries made, the publishers are satisfied that the expense would not, at the present time at any rate, justify the venture. In the form in which it is compiled and published annually, however, we are able in reality to present free to each subscriber to the Canadian Law Times a complete Index-Digest of the Canadian cases for the year. While notes of all these cases appear in the Occasional Notes for the year, the references in the Index-Digest are not confined to the pages of the notes, but give also the references to the official reports of the cases in full, wherever they are so reported.

In addition to the cases which appear in the official reports, there are noted or reported in the Occasional Notes on an average, more than sixty cases in each year which are not reported or noted elsewhere, and which, from their peculiarity or importance, are of use to the profession. We have lately made arrangements with gentlemen in Nova Scotia and New Brunswick to report specially for us notes of Chamber cases, and Practice

cases in those Provinces, which will, we hope, still further increase the usefulness of the notes. An exchange of decisions between the Provinces upon points of practice will be found of practical advantage.

### **The New Consolidated Rules.**

The Commissioners, who have been at work during the past ten months, have now completed a first draft of the consolidation of the Rules, and have published a pamphlet for distribution amongst the profession and others, with a view to obtaining suggestions with regard to the consolidation and amendment of the Rules, a number of which have been remodelled so as to make a change in the present practice. They also give a list of Rules which it is proposed to repeal. Amongst the more important of the changes we note the following:

Rule 214. Amended so as simply to provide that one or more Judges shall be selected for vacation duty.

Rule 215. To be rescinded.

Rule 1429. Amended so as to make Divisional Court sittings monthly. This change appears to be connected with other changes noted hereafter respecting the business in Divisional Courts and the Court of Appeal.

Rule 245. Special endorsements may be made though claims for unliquidated demands are also endorsed. See Rule 739, *infra*.

Rule 1310. Appearance in Algoma, Nipissing, Rainy River and Thunder Bay, to be within twenty days in all cases.

Provision is also made for entry of a conditional appearance by leave of the Court or Judge.

Rule 300. Persons may be joined as plaintiffs in whom any right to relief arising out of the same transaction or occurrence, or series of transactions or occurrences, is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law

or fact would arise. Subject to special provision as to separate trials and costs. This is the adoption of the recent English Rule passed in consequence of *Smurthwaite v. Hannay*, L. R. (1894), A. C. 494.

Rule 1313. Where a defendant claims contribution against a co-defendant, copy of the statement of claim or writ need not be served with the third party notice, and service may be effected on the solicitor in the action, if any.

In actions by or against persons carrying on business under firm names, the English Rules contained in O. xlviii. a are adopted, except Rule 11, which is amplified.

Rule 554. The cases in which special cases may be stated are extended, so as to embrace not merely questions of law upon which the payment of money may depend, and to enable the Court to award judgment for any specific relief.

Payment into and out of Court.—Several Rules on this subject are amended. Orders and reports showing infants entitled to money are to state the date of the birth of the infant, failing which the money will not be paid out. The mode of payment into Court with a pleading at Gore Bay, Bracebridge and L'Orignal is amended; the officer receiving the money being required to pay it into Court as soon as possible.

Rule 487. Only one existing officer of a corporation may be examined without special order, and no past officer is to be examined without special order.

Rule 506. The depositions of an officer taken for discovery may be used as evidence whether the officer was cross-examined or not. A part may also be used, but in that case, either any other part may be put in as explanatory, or the whole of the examination of the officer may be put in as evidence on the part of the corporation.

Rule 1277. Non-jury actions at Toronto are to be entered not later than the expiration of the time mentioned in the notice of trial, and the action is not to be

placed in the peremptory list before the expiration of ten days from the entry. Remanets at Toronto non-jury sittings are not to require fresh notice of trial.

Rule 739. Summary motions for judgment may be made in respect of any cause of action specially endorsed, though the writ may also be endorsed with other claims. Amendments of the writ may be ordered on such motion, and judgment awarded in accordance with the amended writ. See Rule 245, *supra*. The motion is to be a motion for judgment and not for an order for judgment.

Rule 1420. Reports of Local Masters are to be filed in the office of the Deputy or Local Registrar for the county in which the proceedings were commenced.

Rule 848. A report is to become absolute at the expiration of fourteen days from the day of filing the same. The fourteen days to be computed as in other cases, so as not to include the day of filing.

Appeals.—An attempt has been made to divide appeals between the Divisional Courts and the Court of Appeal. All appeals which include a motion for a new trial, whether combined with, or as an alternative of any other motion against the judgment, are to be made to a Divisional Court, and not to a Court of Appeal.

Appeals may be either to a Divisional Court or to the Court of Appeal in the following cases:

1. In actions tried without a jury.

2. In actions tried with a jury.

- (a) Upon the ground that the judgment is wrong as entered upon the findings of the jury.

- (b) Upon the ground that notwithstanding the findings of the jury the applicant is entitled to judgment.

- (c) In any case in which the provision above alluded to as to motions for a new trial does not apply.

On appeals to the Court of Appeal, security for costs of the appeal is to be given before the reasons of

appeal are delivered, and upon the security for costs being allowed, execution is to be stayed pending the appeal, except,

- (a) where the judgment directs the assignment or delivery of personal property, or
- (b) directs the execution of a conveyance or other instrument, or
- (c) directs sale or delivery of possession of real property, or
- (d) awards a mandamus or injunction.

In cases (a), (b), and (c), execution is only to be stayed as mentioned in Con. Rule 804, and in case (d), on special application to the Court of Appeal.

It is provided, however, that upon special application, the Court of Appeal, or a Judge, may order that execution shall not be stayed except upon such terms as may be just, including the giving of security for the debt or damages or costs, or any less sum; and on the other hand the same (Court or) Judge may direct execution to be stayed, dispensing with any security for costs or otherwise, as may be just.

The procedure on appeals to the Court of Appeal is to be slightly different. Notice of hearing is to be served within one month after the pronouncing of the judgment for, and not less than fourteen clear days before the first day of the sittings of the Court, which commences after the expiration of one month from the pronouncing of judgment. Reasons of appeal are to be delivered not later than fourteen days before the first day of such sittings. The reasons may form part of the notice or be delivered separately.

Rule 991. Partition proceedings may be taken by "any adult person entitled to compel partition of land."

Rule 1045. All the Rules relating to bailable proceedings have been re-drawn and modernized, though the procedure is not substantially changed.

Amongst new provisions are the following:

In non-jury actions in the County of York, the action may be dismissed for want of prosecution, if the

plaintiff does not serve notice of trial within six weeks after the pleadings are closed.

Where defendant fails to appear or to plead, the action is considered *pro confesso*, and the defendant is not to be entitled to notice of any subsequent proceedings in the action, except where otherwise provided by the Rules. The Rules elsewhere provide that notice shall be given where an interlocutory judgment is signed, and notice of assessment is necessary, also in certain cases where the defendant is to be notified of the taking of accounts in the Master's office.

An appeal is to lie in the Divisional Court, or to the Court of Appeal, from the judgment or order of a Judge in Court upon appeal from the report of a Master or a Referee, in the same manner and subject to the same restrictions as in the case of other judgments or orders of a Judge in Court.

A person not within Ontario may be proceeded against as a garnishee, in cases where he might be sued by the debtor within Ontario.

A *præcipe* order may be issued by a client for delivery and taxation of a solicitor's bill, or for the taxation of the bill already delivered, within one month from the delivery, and by the solicitor for the taxation of a bill delivered, at any time after the expiration of one month from the delivery, provided an order has not been already obtained.

Where security for costs is ordered, proceedings in the action are to be stayed from the service of the order until the security is given, and if given by bond, until the bond is allowed.

The following rules are omitted from the consolidation: Rules 51 to 54, 70, 161, 162, 189, 305, 341, 369 b, 378, 482, 514 to 518, 532, 538, 568, 572, 580, 581, 631, 679, 686, 691, 692, 746, 747, 793, 854, 903, 1129, 1134, 1219 to 1224.

Some of these are obsolete or unnecessary, and others not adapted to the practice in Ontario, but a few appear to have been omitted designedly so as to change the practice. Amongst these may be noted 341, pre-

venting in an action for recovery of land the joinder of other causes of action; and 378, requiring a third party served with a counter-claim to enter an appearance; and 854, providing for an appeal from the Taxing Officers in Toronto to the Master in Chambers, or the Master in Ordinary, pending a taxation.

**Solicitor and Client—Purchase of Judgment.**

The rule that a solicitor cannot make a purchase of the fruits of the litigation, *pendente lite*, received what appears to be an extension in *Pittman v. Prudential Deposit Bank*, 13 Times L. R. 110, although the Court of Appeal decided the case as being within the rule, which they say should be kept as large as possible.

The rule is exemplified in *Simpson v. Lamb*, 7 E. & B. 24. In that case a Mr. Scott was attorney for the plaintiffs, and conducted litigation for them as attorney on the record, down to a certain period, when a Mr. Shaen took charge as plaintiffs' attorney, though without the formality of an order to change attorneys. While he was conducting the action, he purchased the plaintiffs' judgment, after verdict, but before entry of judgment. The plaintiffs being nonsuited in another action against the same defendants, a motion was made to set off the judgments, and the validity of Mr. Shaen's assignment came into question. The Court held that it was invalid as against the policy of the law, having been made *pendente lite*.

In *Pittman's* case, the plaintiff owed a debt to his solicitor for costs, and pending a suit, which was being carried on by the solicitor for the plaintiff, an arrangement was entered into by which the fruits of the litigation were to be assigned to the solicitor. There was a dispute as to whether it was a formal agreement or a mere understanding, but Mr. Justice Wills held that an agreement had been made which would have been binding but for the rule. After judgment recovered for the plaintiff, the solicitor placed a deed of assignment before his client, which the latter executed, transferring the judgment to the solicitor. The amount of the judgment was then garnisheed, and the validity of the

assignment came on to be tried in an issue. It was held that the assignment was invalid, and the Court of Appeal affirmed the decision. It was claimed that the case did not come within the rule, because the agreement pendente lite was invalid according to *Simpson v. Lamb*, and there was, therefore, nothing upon which to found the assignment made after the judgment. Lord Justice Rigby, however, said that the rule would be rendered nugatory if this case did not fall within it. Presumably, the client would imagine that he was bound by the antecedent arrangement to make the assignment after judgment, and, therefore, the mischief would be as great as if the solicitor relied only on the arrangement made pendente lite. A solicitor who knew the law would be able to overreach a client who did not. If the decision had been placed upon this ground alone, it would have been perfectly intelligible; but in each case there would necessarily be an enquiry as to whether the client supposed that he was bound by the antecedent arrangement to execute the subsequent assignment. Whether such a doctrine is the basis of the decision, may be in doubt from the report. But it seems to be left open for further discussion. The Master of the Rolls said: "Judgment was recovered, and the solicitor, acting on the previous arrangement, and without telling the client that the arrangement was not binding on him, and that he ought not, either morally or legally, to consider it binding upon him, placed the assignment before the client and got it executed." If importance is to be attached to the fact that the true effect of the antecedent arrangement was not explained to the client when executing the assignment, then the whole matter may take a contrary turn if this information should be given in a like case. Thus, if the solicitor had said, "Our arrangement made pending the litigation is no good; I want you to sign an assignment that will be valid," and the client had done so, would it not be open to argument, both on principle and on the hypothesis pregnant in Lord Esher's remarks, that the assignment made under such circumstances was valid? If no agreement pendente lite were made, and an assignment were entered into after judgment it would be good.



If an invalid arrangement were made pendente lite, and its invalidity were explained, and a new assignment made after judgment, why should it not be as good as if no previous arrangement had been entered into?

The matter would then depend upon a question of fact, Did the solicitor explain to the client that he was not bound, and did the client, knowing that, assign the fruits of the litigation. As an extension of the rule it seems curious that an arrangement pendente lite through invalid, is good enough to make a subsequent assignment bad, which would otherwise have been good. As depending on a question of fact, the case is not within the rule at all. While the decision is put as depending on the rule, there is ground for belief that if the facts had been, as in our hypothetical case, the result would have been different.

#### **Conveyances by Married Women.**

Some one, in love with the Revised Statutes of Ontario, recently referred to them as "landmarks of progress." The wish is devoutly expressed, that when the landmarks are being put down in 1897, they may be so planted as not to act as stumbling blocks to those who have to follow in that path.

A comparison of sections three and six of chapter 134, "An Act to facilitate the Conveyance of Real Estate by Married Women," will show that it does not. It affords, however, entertainment of a certain kind. One may speculate as to whether the draftsman had any intention, and, if so, what it was. One who desires no more to be known of him than that he has stumbled on one of the "landmarks" hands us the following, with the assurance that there are others which can be similarly, and quite as effectively, treated.

Whenever a feme covert  
 Shall make a deed of land,  
 She may act as if discovert,  
 And sign it with her hand.

But if, when you do tender it,  
 Its efficacy's doubted,  
 Her husband's hand will render it  
 As good as if without it.

## BOOK REVIEWS.

*Manual of the Law of Landlord and Tenant*, for use in the Province of Ontario. By R. E. KINGSFORD, M.A., LL.B., Barrister, Toronto. Toronto: The Carswell Co., Ltd. 1896.

All attempts to educate the public in either the science or practice of the law by means of popular treatises, have so far signally failed, for very obvious reasons. "Every Man His Own Lawyer," and books of that character, result usually in drifting plenty of work into the professional man's office. The present work is designed to impart to the general public a knowledge of what concerns every man who has a habitation, whether landlord or tenant. But it is doubtful if it will compass that end—not because it partakes of the character of such works as we have mentioned, but because it more nearly approaches a scientific treatise for professional use. Mr. Kingsford has endeavoured to codify the law, and he has met with a considerable amount of success. Though the language is not that of a code, the substance is; and the condensation of large principles into small space by the use of clear and concise language is excellent. At the end of each chapter selected cases upon important or peculiar points in the chapter are cited. The book will be found extremely useful for ready reference; and if the ordinary man of business can grasp the meaning, it will become his stand-by.

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*The Law of Evidence in Civil Cases*, by BURR W. JONES, of the Wisconsin Bar, Lecturer on the Law of Evidence

and other subjects in the Law School of the University of Winconsin. Three volumes. San Francisco: Bancroft-Whitney Co. 1896.

Like Taylor on Evidence, this book is largely founded on Greenleaf, while other well-known works are much used. The arrangement is in sections numbered consecutively. The citations are carried to the end of the section, instead of to the foot of the page as usual. There are frequent references to articles on debated points in the law of evidence, which have appeared in the various law magazines and journals, and the cases there collected, and the opinions there expressed, are thus brought to the reader's notice. Various publications of annotated cases are also referred to. While grateful for this valuable feature, the busy practitioner will find some slight drawback in the absence of tables of abbreviations and of cases cited. The task of preparing a treatise for general use in the many independent jurisdictions of the Union is a very heavy one, and as might be expected the author often finds it necessary to mention conflicting decisions, without trying to reconcile them. The index is well printed, of the usual lengthy nature, and not without at least one touch of unconscious humour in the cross references. Our Jewish, Scotch Kirk, and Quaker friends will be surprised to find that the manner in which they and some others respectively take an oath is indexed as—"Heathen, mode of swearing, 733."

The author has collected many American cases, and many definitions by well-known writers, and while his book cannot serve the Canadian practitioner as a vade mecum in the Court room, or as the sole treatise on the subject in the library, it will find a place amongst the books of reference used by brief makers and counsel.

H. W. M.

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*A Compendium of the Law of Property in Land.* By WILLIAM DOUGLAS EDWARDS, LL.B., of Lincoln's Inn,

Barrister-at-Law, etc., etc. Third edition. London: Stevens & Haynes. 1896.

Apart altogether from the absolute merits of a book, if it passes into three editions within eight years, it must be useful. In 1888 the first edition of this work was published, and we then spoke favourably of it and predicted that it would become a useful book. Our predictions have been amply verified. The writer has himself had occasion frequently to consult the work, which is large and comprehensive in its scheme, and he has never been disappointed.

# THE CANADIAN LAW TIMES.

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FEBRUARY, 1897.

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## RESULTING TRUSTS.

*(Concluded.)*

WE have already seen that the general rule is that where a man makes a voluntary conveyance of his property to another, without there being anything on the face of the conveyance to indicate that he intended to vest a beneficial interest in the grantee, there is a legal presumption of fact that the grantor intended the property to be held for his own benefit, and by virtue of this presumption a resulting trust arises in favour of the grantor. It is, however, a general rule that *when by presumption you come to a construction against the apparent intention of the instrument, that presumption may be rebutted by parol evidence* (n).

One of the most common methods of rebutting the presumption in question, and of thereby preventing a resulting trust, is to show such surrounding facts and circumstances as will raise a counter presumption that the grantor intended to make a gift or advancement, which counter presumption, being in favour of the apparent intent of the instrument, will override the presumption which is in favour of a resulting trust.

The doctrine as to advancement is admirably explained by Sir George Jessel, M.R., in *Bennet v. Bennet* (o), where

(n) *Hall v. Hill*, 1 Dr. & War. 94; *Kirk v. Eddowes*, 8 Hare 509.

(o) 10 Chy. D. 476 et seq.

he says: "The doctrine of equity as regards presumption of gifts is this, that where one person stands in such a relation to another *that there is an obligation on that person to make a provision for the other*, and we find either a purchase or investment in the name of the other, or in the joint names of the person and the other, of an amount which would constitute a provision for the other, the presumption arises of an *intention on the part of the person to discharge the obligation to the other*; and therefore, in the absence of evidence to the contrary, that purchase or investment is held to be in itself evidence of a gift. In other words, *the presumption of gift arises from the moral obligation to give*.

"That reconciles all the cases on the subject but one, because nothing is better established than this, that as regards a child, a person not the father of the child may put himself in the position of one *in loco parentis* to the child, and so incur the obligation to make a provision for the child.

"Now, what is the meaning of the expression 'a person in *loco parentis*'? I cannot do better than refer to the definition of it given by Lord Eldon in *Ex parte Pye*, 18 Ves. 140, referred to and approved of by Lord Cottenham in *Powys v. Mansfield*, 3 My. & Cr. 359, 367. Lord Eldon says it is a person 'meaning to put himself in *loco parentis*; in the situation of the person described as the lawful father of the child.' Upon that Lord Cottenham observes: 'but this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child, and it would be most illogical from the mere exercise of any of such offices or duties by one not the father to infer an intention of such person to assume also the duty of providing for the child.'

"So that a person *in loco parentis* means a person taking upon himself the duty of a father of a child to

*make a provision for that child.* It is clear that in that case the presumption can only arise from the obligation, and therefore in that case the doctrine can only have reference to the obligation of a father to provide for his child, and nothing else.

“ But the father is under that obligation from the mere fact of his being the father, and therefore no evidence is necessary to show the obligation to provide for his child, because that is part of his duty. In the case of a father you have only to prove the fact that he is the father, and when you have done that the obligation at once arises; but in the case of a person in *loco parentis* you must prove that he took upon himself the obligation.

“ But in our law there is no moral legal obligation—I do not know how to express it more shortly—no obligation according to the rules of equity—on a mother to provide for her child; there is no such obligation as a Court of Equity recognizes as such.

“ From *Holt v. Frederick*, 2 P. W. 357, downwards, it has been held that no such obligation exists on the part of a mother; and therefore, *when a mother makes an advancement to her child, that is not of itself sufficient to afford the presumption in law that it is a gift*, because equity does not presume an obligation which does not exist.

“ But there is a decision of Vice-Chancellor Stuart to the contrary in *Sayre v. Hughes*, L. R. 5 Eq. 376, decided in 1868, although there was a prior decision of the Court of Appeal in *Re De Visme*, 2 D. J. & S. 17, in which the law was assumed to be as I have stated it. . . . We then arrive at this conclusion, that in the case of a mother—this is the case of a widowed mother—it is easier to prove a gift than in the case of a stranger; *in the case of a mother very little evidence beyond the relationship is wanted*, there being very little additional motive required to induce a mother to make a gift to her child.”

We find then that the presumption of advancement is founded upon an obligation to support. The result follows that there are other persons besides children to whom an

advancement will be presumed. *Thus a transfer or conveyance of property by a husband to his wife will be presumed to be an advancement (p).*

If the intention to advance exists at the time of the making of the conveyance, whether it be a conveyance of the grantor's own property, or a conveyance which the person who advances the money as purchaser procures to be made, such intention irrevocably fixes the transaction as an advancement, and no subsequent change of intention can alter its character (q).

Proving facts which raise a presumption of advancement is only one of the modes of rebutting the presumption which gives rise to a resulting trust, and it may be laid down as a general rule that the person to whom the legal estate is conveyed may, in all cases, rebut the presumption by adducing parol evidence, which proves that there was an intention to confer the beneficial interest upon him.

Mr. Justice Strong says: "But a trust thus *prima facie* resulting from the payment of an obligation to pay the purchase money may always be rebutted by parol evidence on the part of the nominal purchaser; and so, on the other hand, this rebutting evidence may, in turn, be contradicted by the same sort of evidence on the part of the alleged beneficiary, and the question to be decided may thus become a pure question of fact to be determined on the conflicting evidence alternately adduced for these purposes" (r).

Parol evidence is admissible to prove that lands were purchased by a father in the name of his child, not as an advancement, but as a trustee (s).

"The relation of parent and child is only evidence of the intention of the parent to advance the child, and that evidence may be rebutted by other evidence, manifesting the intention that the child shall take as a trustee. . . .

(p) *Re Eykyn's Trusts*, 6 Chy. D. 115.

(q) *Standing v. Bowring*, 31 Chy. D. 282.

(r) *McKercher v. Sanderson*, 15 S. C. R. 298.

(s) *Williams v. Williams*, 32 Beav. 370. And see *Marshall v. Crutwell*, L. R. 20 Eq. 328; *Lloyd v. Pughe*, L. R. 8 Chy. App. 88.



*That contemporaneous acts and even contemporaneous declarations of the parent may amount to such evidence, has often been decided. Subsequent acts and declarations of the parent are not evidence to support the trust, although subsequent acts and declarations of the child may be so; but, generally speaking, we are to look at what was said and done at the time" (t).*

Sir John Romily, M.R., speaking of the kind of evidence which may be adduced in such cases, says: "The evidence ought to be contemporaneous, or nearly so, because subsequent acts or subsequent declarations by a father will not enable him to convert an advancement for his son into a beneficial purchase for himself. This principle, of course, does not apply to subsequent acts and declarations of the son, which may be used for the purpose of showing that he considered himself only to be a trustee" (u).

The presumption of an advancement may not only be rebutted entirely, but also may be rebutted in part, as, for example, by showing that the purchaser intended to allow the holder of the legal estate to enjoy beneficially for life. In such a case the resulting trust will be rebutted as to the life interest, but will prevail as to the remainder (v).

"A resulting trust may be rebutted as to part of the land comprised in a deed, and prevail as to the remainder; and if it can be rebutted as to part of the land, there can be no reason why it may not equally be rebutted as to part of the interest in the land" (w).

A. H. MARSH.

(t) Per Lord Langdale, M.R., in *Sidmouth v. Sidmouth*, 2 Beav. 454-5; *Christy v. Courtenay*, 13 Beav. 98-9; *Williams v. Williams*, 32 Beav. 370.

(u) *Jeans v. Cooke*, 24 Beav. 521.

(v) *Rider v. Kidder*, 10 Ves. 360, 368.

(w) Per Sir John Leach, M.R., in *Benbow v. Townsend*, 1 My. & K. 510.

## OF THE BORROWING POWERS OF BUILDING SOCIETIES.

Among the innumerable points from time to time arising in connection with the law applicable to corporations, one of considerable practical importance is presented by the question relating to the extent to which building societies, incorporated under the Building Societies Act of Ontario, can legally lend to and borrow from one another. Perhaps, as emphasizing the practical importance of the general question of the borrowing powers of corporations, and indicating the pitfalls which beset unwary lenders to such bodies, it may be well to cite certain significant decisions upon the subject:—

In *re Sheffield Bdg. Society, Ex parte Watson* (a), the facts were as follows: The directors of an incorporated building society, which had no borrowing powers, borrowed money for the benefit of the society, and gave to the lenders as security the promissory notes of the directors. The society was afterwards incorporated under the Building Societies' Act, 1874 (37 & 38 Vict. c. 42), and acquired borrowing powers. The appellant, who was the representative of the lender, applied to the society for repayment of the loan, but ultimately agreed to refrain from legal proceedings against the society on the directors giving him a deposit note for the amount due. The directors accordingly gave him a deposit note under the seal of the society, stating that the money was lent by the appellant on the date of the deposit note, and he thereupon gave to them the promissory notes above mentioned. It was held that the deposit note was not binding on the society.

Wills, J., says in his judgment: "This is not a case in which it is even necessary to resort to the rule laid

(a) 21 Q. B. D. 301.

down in *Chapleo v. Brunswick Bdg. Society* (b), that persons dealing with a corporation having a limited power of borrowing are put upon inquiry whether that limit is being exceeded."

In *Fontaine v. Carmarthen Ry. Co.* (c), a Mr. Weeks had lent money on debenture to the defendants. At the time he did so their borrowing powers were already exceeded. Page Wood, V.-C., held that the debenture was void ab initio.

In *National Permanent Benefit Building Society, Ex parte Williamson* (d), again, where the rules gave no power to borrow, and the directors, nevertheless, borrowed money for the purpose of advancing it to their members on the security of their shares, it was held that the transaction was ultra vires, and that the lender had no legal or equitable claim against the company.

Mr. Bryce, in his well-known work on *Ultra Vires*, puts the matter flatly: "A corporation incurs no liability by engaging in transactions aliunde those for the prosecution of which it was created. Neither at law nor in equity will the other contracting parties obtain any redress in any form of suit upon the engagement itself from the corporation, whatever be the fraud or however unjust the refusal of such redress."

The difficulty of dealing with the powers of these societies in Ontario is somewhat enhanced by the uncertainty which meets one at the threshold of the enquiry, in the fact that it is admittedly an unsettled question in which of our legislative bodies, Provincial or Dominion, the jurisdiction over the subject is vested.

The Legislatures themselves appreciate and admit this doubt (e). The difficulty is not, however, as serious as might at first sight appear, inasmuch as the legislation of the two bodies upon the subject has, to a large

(b) 6 Q. B. D. 696.

(c) L. R. 5 Eq. 316 (cited in the above case).

(d) L. R. 5 Ch. 309.

(e) See R. S. O. 1877, Appendix C, and R. S. C., Schedule B.

extent, run parallel, so that we find most of the more important enactments relating to the subject repeated, frequently verbatim, on the statute books of each Legislature.

The practical form in which the question generally presents itself relates to the manner in which the advance (by one society to another) is to be secured. So far as a loan on the security of debentures of the society is concerned, no difficulty is experienced, R. S. O. c. 169, ss. 33, 68, etc., and 47 Vict. (D.) c. 40, s. 3, expressly authorizing transactions of that character. It is when it is proposed to secure the advance by an hypothecation of the mortgage securities of the borrowing society that the difficulty arises. As against the power to secure advances in that manner, it is urged that no express power is given by the Legislatures to such societies to secure advances in that way, and that the same does not, therefore, exist.

However different may have been the original objects of such societies, it cannot be denied that at present their main, if not their sole, business is the investment of money on the security of mortgages of real estate. It is also well understood that it is the almost universal custom of such societies to supply themselves with money for investment by the issue of their own debentures at such rates and for such periods as they deem advantageous. It is, of course, a prime object of the society to have as much as possible of its money under investment at the most advantageous rates obtainable at all times. At the same time, the carrying out of this object is constantly controlled by the necessity which exists of having at all times an ample supply of ready money on hand to meet the legitimate calls upon the society's funds. As, in the majority of cases, the society has no knowledge, till the period arrives, whether its debenture holders will require payment at maturity, or will prefer to allow the loan to continue for a further term, it is obvious that it cannot tell beforehand, with any appreciable degree of certainty, what amounts of ready money it will be required from time to time to have at command. It is plain, therefore,

that the most advantageous conduct of the society's business requires that its facilities for borrowing should be as little hampered as possible. It will be readily seen that where, as in Ontario, there is a large number of building societies, all investing their funds on securities of the same nature, namely, selected mortgages of realty, and all having constantly in their vaults extensive assets of that nature, the general business of such societies will be immensely facilitated if they are able, when occasion requires for obtaining advances from a sister society, to offer to that society such assets, in other words, assets of the very nature of those which it is the main business of such sister society to make its ordinary loans upon, as security for the advance. It will be readily understood that to a building society accustomed to invest the great bulk of its funds on mortgages of real estate, and equipped with every means necessary to enable it to determine the value of such securities, no other form of security, be it debenture or what not, will appear so satisfactory as mortgages of that nature.

The effect of such unrestricted power of interchange of securities would evidently be to render it the less necessary for any individual society to keep on hand at a loss of interest any very considerable sum of ready money.

It is evidently, therefore, a matter of no little moment to such societies that it should be clearly determined whether they have or have not the power to make use of their mortgage assets to facilitate their borrowing operations in the manner mentioned. As against the existence of such a power (although it is admitted that the society making the advance is amply empowered to do so) (*f*), it is pointed out that as regards the borrowing society, there does not appear to be anything in the Ontario Acts expressly giving the direct power to mortgage or pledge any of the assets, and that some of the sections would seem to imply the contrary. Thus R. S.

(*f*) R. S. O. c. 169, ss. 31, 33, 66, and R. S. O. c. 182.

O. c. 169, s. 55, in restricting borrowing powers, makes the paid up and subscribed capital liable for the amount borrowed, received or taken by the society; and s. 23 apparently contemplates no liabilities other than deposits, debenture stock and debentures; while s. 33 only gives power to resell purchased mortgages, and s. 31 only the same power as to direct mortgages. It is further pointed out that, as originally constituted in 1846, these societies were only intended to have funds raised by subscriptions of members, which could in turn be lent to other members, and that a power to borrow money on mortgage or otherwise formed no part of their scheme. That the growth of the present extended powers of the societies has been gradual, and that the Legislature has from time to time expressly enlarged them when it deemed necessary; and that none of these enlargements seem to have engrafted, at least expressly, on the original powers of building societies the power to pledge the company's securities.

The further point is made that R. S. O. c. 169, s. 55, makes the paid in and subscribed capital of the society liable for the amount borrowed, and that s. 28 and ss. 68 to 71, although not directly, point to the desire of the Legislature that all moneys borrowed should rank alike.

This, we think, is a fair statement of the case of those who doubt the capacity of the societies in question to secure advances in the manner indicated.

We think the question is one which cannot be adequately dealt with without keeping clearly in view the attitude which the Courts have shown themselves disposed to assume towards the question of corporate powers in general.

As pointed out by Mr. Pollock, two totally different doctrines have prevailed at different times on this subject, both of which have found numerous and weighty adherents.

Mr. Justice Lindley indicates the difference between the two positions by saying that it is "as to whether the Act of incorporation is to be regarded as conferring unlimited powers except where the contrary can be shown,

or whether alleged corporate powers are not rather to be denied unless they can be shown to have been conferred either expressly or by necessary implication."

It would seem that the views of the Courts upon the subject have in course of time undergone a distinct double change. In olden days, by reason, no doubt, of the comparatively small number of corporations in existence, Courts of law were less frequently called upon to deal with questions of corporation law.

When these questions began to be mooted the Courts of the day, imbued with the common law doctrines, appear to have been inclined to adopt the former of the positions indicated by Mr. Justice Lindley.

The views which then prevailed upon the subject are fairly indicated by the expressions of the Judges in a case of *Re Sutton's Hospital* (g): "When a corporation is duly created all other incidents are tacite annexed . . . and therefore divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As (1) by the same to have authority, ability and capacity to purchase, but no clause is added that they may alien, etc., and it need not for it is incident; (2) to sue and be sued, implead and be impleaded; (3) to have a seal, etc., that is also declaratory, for when they are incorporated they may make or use what seal they will. So Shepp. Touch. 57, 'Although it be a corporation that doth make the deed, yet they may seal with any other seal besides their common seal, and the deed never the worse.'"

Hobart, C.J., corroborates this view, and says that a power to make by-laws, though given by a special clause in all incorporations, is needless, "for I hold it to be included by law in the very act of incorporating, as is also the power to sue, to purchase and the like" (h).

For a considerable time after the decision of the *Sutton's Hospital* case questions of the nature of those under discussion seem to have had little prominence

(g) 10. Rep. 304.

(h) Hob. 211, pl. 268.

in the Courts, but, strangely enough, when they began again to be canvassed, chiefly in connection with railway cases, both Parliament and the Courts seem to have entirely lost sight of that case and the doctrine therein laid down, and to have proceeded as though the other view of the matter, viz., that referred to as the doctrine of "special capacities," were undoubtedly the true one. Lord Langdale, in his judgment in *Coleman v. Eastern Counties Ry. Co.* (i), says "That the powers which are given by an Act of Parliament . . . extend no further than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and words which the Act has expressly sanctioned. . . . They [the company] have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the Act of Parliament, but they have no power of doing anything beyond it."

After the decision of a number of subsequent cases on the subject (j), the case of *East Anglian Ry. Co. v. E. C. Ry. Co.* (k) was decided, and was for a considerable time a leading authority on this branch of law. It laid down the doctrine of special capacities in a very positive and uncompromising manner, and formed the main stumbling-block in the way of a return by the Courts to the common law doctrine of general capacity (l).

It was even argued in one case (m) by a staunch adherent of the doctrine of special capacities (unsuccessfully, for the credit of the common sense of the Bench of the day be it said), that no right of action existed on debentures issued by a company under the express authority of its Act, because the Act had no express provision conferring such remedy.

(i) 10 Beav. 1.

(j) Among them being *Solomons v. Lang*, 12 Beav. 339; *Cohen v. Wilkinson*, 12 Beav. 138; 1 Mac. & G. 481; *Hodgson v. Earl of Powis*, 1 D. M. & G. 6; *Bagshaw v. East Union Ry. Co.*, 7 Ha. 114.

(k) 11 C. B. 775.

(l) See also *Macgregor v. Dover and Deal Ry. Co.*, 18 Q. B. 618.

(m) *Hart v. Eastern Union Ry. Co.*, 7 Ex. 246; in Ex. Ch., 8 Ex. 116.



This was an instance of the "special capacities" doctrine run mad, and ere long the opposite view again came into vogue, and it may be fairly stated that the leaning of the Courts at the present day, as indicated by the more recent cases, is towards that doctrine. This will appear by reference to *S. Yorkshire Ry. and River Dun Co. v. G. N. Ry. Co.* (*n*), in which case Lord Wensleydale, then Baron Parke, in the Court below, held that as a corporation the defendants had power to do all things connected with the management of the concern, unless prohibited by their Act of Parliament.

This view is also borne out by the more recent case of *Taylor v. Chichester and Midhurst Ry. Co.* (*o*). Blackburn, J., in this case says: "Lord Wensleydale's mode of stating the proposition has been adopted as expressing the true doctrine by the Court of Queen's Bench in *Chambers v. Manchester and Milford Ry. Co.*, 5 B. & S. 588; by the Court of Common Pleas in *South Wales Ry. Co. v. Redmond* (*p*); by the Court of Exchequer in *Bateman v. Mayor, etc., of Ashton-under-Lyne* (*q*); by Lord Cranworth, L.C., in delivering the judgment in the House of Lords in *Shrewsbury and Birmingham Ry. Co. v. N. W. Ry. Co.* (*r*), where he says at p. 135, "Prima facie corporate bodies are bound by all contracts under their common seal. When the Legislature constitutes a corporation it gives to that body prima facie an absolute right of contracting. But this prima facie right does not exist in any case where the contract is one which, from the nature and object of the incorporation, the corporate body is expressly or impliedly prohibited from making; such a contract is said to be ultra vires. And the question here, as in similar cases, is whether there is anything on the face of the Act of incorporation which expressly or impliedly forbids the making of the

(*n*) 9 Ex. 55.

(*o*) L. R. 2 Ex. 356, 383.

(*p*) 10 C. B. N. S. 675, per Erle, C.J., at p. 682.

(*q*) 3 H. & N. 323.

(*r*) 6 H. L. C. 113.

contract sought to be enforced. Again, in *Scottish N. E. Ry. v. Stewart* (s), Lord Wensleydale said: "There can be no doubt that a corporation is fully capable of binding itself under any contract under its common seal in England, and without it in Scotland, except when the statutes by which it is created or regulated expressly or by necessary implication prohibit such contract between the parties. Prima facie all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided." To the same effect is Lord St. Leonards in *E. C. Ry. Co. v. Hawkes* (t): "The appellants as a corporation have all the powers incident to a corporation, except so far as they are restrained by their Act of incorporation. Directors cannot act in opposition to the purpose for which their company was incorporated, but short of that they may bind the body just as (the proper officer, etc., of) corporations in general may do." And again, p. 371: "The safety of men in their daily contracts requires that this doctrine of ultra vires should be confined within narrow bounds." He also stated the effect of this and other recent decisions of the House of Lords as being (u) to "place the powers and liabilities of directors and their companies in making contracts and in dealing with third persons upon a safe and rational footing. They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established, but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their Acts, and which cannot clearly be shown not to fall within them."

The late cases in the Courts of Equity also indicate a marked modification of their original views, which leaned entirely to, and, in fact, first promulgated the doctrine of special capacities. As said by Mr. Pollock: "In considering the power of building societies to borrow money, the question has been treated on all

(s) 3 Macq. 382, 415.

(t) 1 D. M. & G. 737, 752, 759-60; 8. C., 5 H. L. C. 331, at p. 373.

(u) Page 381, and see L. R. 9 Ex. 389.

hands as being not whether the borrowing of money was expressly or necessarily permitted by the statute, but whether it was forbidden or clearly repugnant to the constitution and objects of the society: *Lang v. Reed*, 5 Ch. 4; *Ex parte Williamson*, ib. 309." And in *Ex parte Birmingham Banking Co.*, 6 Ch. 83, the Court of Appeal held, without hesitation, that an incorporated company can *prima facie* mortgage any part of its property, and this as well for an existing debt as for a new loan. The articles of association authorized borrowing on mortgage, but the Lords Justices did not stop to discuss whether this would or would not include a mortgage to secure pre-existing debts, resting this part of their decision on the general power of a body corporate to "hold property and dispose of it as freely as an individual unless it is specially prohibited from so doing" (v).

One may also refer to the view taken by Turner, L.J., that the affirmative provisions of the Companies' Clauses Act do not exclude other modes of contracting (w).

Lastly, we have the doctrine of general capacity deliberately adopted by the whole Court of Exchequer Chamber in *Riche v. Ashbury Ry. Carriage Co.* (x). A similar view of the law has been taken by the Courts of the United States (y), where it was laid down that corporations, except where restrained by law, have the absolute *jus disponendi* of their property whether of lands or chattels (z).

It has been well laid down by those Courts, as a general rule, that a corporation, in order to attain its legitimate objects, may deal precisely as an individual

(v) *James*, L. J., at p. 87.

(w) *Wilson v. West Hartlepool Ry. Co.*, 2 D. J. & S. 475, 496.

(x) L. R. 9 Ex. 254.

(y) See *Blunt v. Walker*, 11 Wis. 334; *Barry v. Merchants' Exch. Co.*, 1 Sand Ch. (N. Y.) 280.

(z) See also *Reynolds v. Commissioners*, 5 Ohio 205.

may who seeks to accomplish the same ends, i.e., so far as not expressly prohibited (a).

It is also the accepted doctrine in that country that private corporations have implied powers to borrow money in the transaction of their legitimate business unless expressly prohibited (b).

It has been held in the United States Courts that the power to contract debts on the part of a corporation involves the power to pledge the property of the corporation to secure that debt. The question is dealt with in a very rational manner in *Leo v. Union Pacific Ry. Co.* (c) as follows: "The purpose to raise money to meet debts, or for other corporate uses, by pledge of these securities seems to be clearly within the scope of the corporate powers and lawful and proper. The corporation has these securities not yet due. It owes debts, and was created with the expectation that it would owe them, and has implied power to raise money to pay them. It is not disputed that it could sell these securities to raise money to pay its debts, and the power to pledge them is included fairly in the power to sell for the same purpose (d). The orator does not seem to be entitled to have the corporation restrained from raising the money by the pledge of the securities, for that seems to be entirely lawful" (e).

(a) *Barry v. Merchants' Exchange*, *supra*; *Wendell v. State*, 62 Wis. 304; *Wellersburg, etc., Plank Road Co. v. Young*, 12 Md. 476; *Bridgeport v. Railroad Co.*, 15 Conn. 475; *Clark v. Farrington*, 11 Wis. 306; *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98; *Thomas v. Railroad Co.*, 101 U. S. 71; *Davis v. Railroad Co.*, 135 Mass. 258.

(b) *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287; *Mahony Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192; *Chicago, etc., Ry. Co. v. Howard*, 7 Wall (U. S.) 392; *Canal Co. v. Valette*, 21 How. (U. S.) 424; *Partridge v. Badger*, 25 Barb. (N. Y.) 146; *Farnum v. Blackstone Canal Co.*, 1 Sumn. (C. C.) 46; *Ang. & A. Corp.*, sec. 257; *Story on Bills*, sec. 79; *Rockwell v. Elkhorne Bank*, 13 Wis. 653; *Lucas v. Pitney*, 27 N. J. Law 221.

(c) 17 Fed. Rep. 273.

(d) *Platt v. Union Pac. Ry. Co.*, 99 U. S. 48.

(e) See also *Combination Trust Co. v. Weed*, 2 Fed. Rep. 24; *Morawetz on Corp.*, 2nd Ed'n 349; *Lehman v. Tallassee Mfg. Co.*, 64 Ala. 567; *Androscoggin R. Co. v. Auburn Bank*, 48 Me. 335; *Duncomb v. New York, etc., Ry.*, 84 N. Y. 190; *Chouteau v. Allen*, 70 Mo. 338; *Kean v. Johnson*, 9 N. J. Eq. 401.

It has also been repeatedly decided in the American Courts that where a corporation has a general right of disposal of its property, power to mortgage the same necessarily follows. The cases below, amongst others, may be referred to (*f*).

It was held in *England v. Dearborn* (*g*) that, irrespective of statutory authority, a corporation has power to mortgage its property in order to raise money to carry on its business.

The doctrines above enunciated have been repeatedly held in the American Courts to apply to building societies. It has been there decided that whether any particular power is implied in the charter of a building society depends upon whether its exercise would be in substantial furtherance of the legislative intent in creating the corporation.

In *Simpson v. Building Association* (*h*) it was expressly decided that the general rule that a corporation may make any contract fairly within the purposes and objects of its incorporation, except when prohibited by its charter or some statute, applies to building and loan associations (*i*).

It may be added that the particular point under consideration does not seem to have been frequently dealt with by the American Courts. In Maryland the Courts were disposed to affirm the borrowing powers, while the Pennsylvania and Ohio Courts seemed to view it with suspicion. It should be observed, however, that the

(*f*) *Reynolds v. Stark Co.*, 5 Ohio 205; *Burt v. Rattle*, 31 Ohio St. 116; *Jackson v. Brown*, 5 Wend (N.Y.) 590; *Gordon v. Preston*, 1 Watts (Pa.) 385; *West v. Madison Ag. Board*, 82 Ill. 205; *Curtis v. Leavitt*, 15 (N. Y.) 9; *Farmers' Loan Co. v. Hendrickson*, 25 Barb. (N. Y.) 484; *Parish v. Wheeler*, 22 N. Y. 494; *Shaw v. Bill*, 95 U. S. 10; *Jones v. Guarantee Co.*, 101 U. S. 622.

(*g*) 141 Mass. 590.

(*h*) 38 Ohio St. 349.

(*i*) See also *Feister v. Wheeling Bldg. Ass'n*, 19 W. Va. 676; *Mills v. Salisbury Bldg. & Loan Ass'n*, 75 N. Car. 292; *Latham v. Washington Bldg. & Loan Ass'n*, 77 N. Car. 145; *Martin v. Nashville Bldg. Ass'n*, 2 Cold. (Tenn.) 418; *Mechanics' and Workingmen's Mutual Savings Bank and Bldg. Ass'n of New Haven v. Meriden Agency Co.*, 24 Conn. 159; *Same v. Wilcox*, 24 Conn. 147.

question can scarcely be said to have been fairly before either of the latter for decision.

Our own Courts have manifested a disposition to approve and adopt the views of the English Judges as disclosed by the later cases above referred to (j). In the last mentioned case, Ritchie, C.J., cites with approval many of the English cases above referred to. He puts the matter in a nutshell by the test question (p. 547): "Has the corporation in this case, then, gone beyond the objects and purposes expressed or implied in the Act?" The head note records the decision as follows: "Held, affirming the judgment of the Court below, that if the transaction in question" (the purchase of certain lots and contract for building entered into by the directors of a building society incorporated in the Province of Quebec) "was for the purpose of carrying out the objects of the society in strict accordance with its views it was not ultra vires."

The same learned Judge also quotes with approval the following pointed remarks of Coleridge, J., in *Mayor of Norwich v. Norfolk Ry. Co.* (k): "When one considers the immense extension and increase of corporate bodies in modern times, the vast variety of purposes for which they are created, the complication of circumstances under which they are to act, the liability to error in the formation of prospective plans as to detail, and the ever-arising improvement in the means and appliances of mechanics and science, it would seem that public convenience and policy, as well as good sense and justice, require that, within the limits of a substantial adherence to purpose, the empowering clauses of incorporating instruments should be construed largely and liberally, so as not to defeat the purpose by a too narrow restriction of the means."

And again, at p. 554, the same learned Judge approves and adopts the language of Parke, B., in *Reg.*

(j) See *Sheppard v. Bonanza Nickel Mining Co.*, 25 O. R. 305; *Freehold v. Farrell*, 81 C. P. 453; *La Compagnie de Villas du Cap Gibraltar v. Hughes*, 11 S. C. R. 537.

(k) 4 E. & B. 432.

v. D'Eyncourt (*l*): "It is not forbidden expressly or by implication by the Acts of Parliament relating to these companies, and I am happy to find that the law of this case coincides with the honesty of it, and does not sanction the breach by the defendants' company of the solemn contract into which they have fairly entered, and from which they are trying to escape."

From the foregoing sketch it will appear that the drift of judicial opinion has, for a considerable time, been towards the doctrine known as that of general capacity, and that the present position of the Courts upon the subject may be fairly said to be: That a company once incorporated for a specific purpose is ipso facto amply empowered to do every act which may be fairly said to fall within the scope of such purpose—the business for which the company was organized—provided always that such act is not prohibited either expressly or impliedly by the Act of incorporation.

It will appear, too, from an examination of the cases already referred to that the disposition of the Courts is to deal in a liberal spirit with companies, and to so construe their powers as to enable them to transact their ordinary business untrammelled, as far as possible, by technical restrictions. This changed disposition of the Courts in their attitude towards companies is undoubtedly a matter of vital importance in arriving at an accurate determination of questions such as that now under consideration. While the narrower doctrine of equity upon the subject was in full vogue, it is quite possible, even probable, that the decision of the question would have been in the negative. The question would probably have been, "Has the distinct power in question been conferred in unequivocal terms?" and failing a demonstration in the affirmative, the power would very likely have fallen.

It is important to remark, before leaving this branch of the subject, that the doctrine of special capacities appears from an early date to have thoroughly pervaded

(*l*) 4 B. & S. 820.

the English Legislature, so that it is scarcely putting it too strongly to say that their statute books abound in redundant provisions.

As already remarked, the subject of corporate powers did not largely engage the attention either of the Courts or Legislature in earlier days. When, with the great increase in the number of railway corporations, questions of this nature began to claim a larger share of attention, it was perhaps to be expected that the Legislature, at all events, should treat them from the standpoint of special capacities. The reasoning would seem natural: "We create the corporations; they are just what we make them." If, then, the question was as to whether any particular corporation had such and such a power, the answer was, "Have we conferred that power?" As a learned writer puts it: "It never occurred to anybody to think that the common law could have anything of importance to say to the matter. Indeed, to speak plainly, it is clear enough that Parliament had forgotten all about the Sutton's Hospital case, and perhaps it is not surprising that the Courts did not remember it."

This redundancy of enactment is not confined to the English Legislature; our own statute books, it is submitted, teem with it. It is not by any means necessarily an evil. Viewed in the light of declaratory or permissive legislation it is, in many instances, a most salutary thing, and tends to disperse many doubts and make for certainty. We merely say that it is there. If anyone doubts the fact, let him go no further than the Act relating to the subject at present under consideration. R. S. O. c. 169. s. 31, provides that building societies may "take and hold any real estate or securities thereon bona fide mortgaged or assigned to them, etc., and may proceed on such mortgages, assignments or other securities for the recovery of the moneys thereby secured" to the fullest extent. And again, s. 33, "Any society may purchase mortgages, debentures, etc., and may resell any such securities, and for that purpose may execute such assignments or other instruments as may be necessary for carrying the same into effect."



Surely no one will contend that the words as to proceedings and conveyances were necessary, or added anything to the enactment. But in a world filled with doubters, they may not be without their use. It was upon the absence of similar words in the enactment in question, in *Hart v. Eastern Union Ry. Co.*, supra, that the zealous counsel therein based his ingenious but unsuccessful argument.

Another instance of redundant legislation may be referred to here before leaving this branch of the subject. Section 55 of the Building Societies Act, after imposing a limit upon the amount to be borrowed by the society, provides that the "paid in and subscribed capital of the society shall be liable for the amount so borrowed, received or taken by any society." This is a very usual and useful provision, but it can hardly be thought that it adds very much to the enactment. It would scarcely be argued that the debenture holders of a company authorized by statute to issue debentures would have no recourse to the subscribed capital of the company in the absence of such a provision. We are the more particular in referring to this provision because an argument has been based upon it against the existence of the power under discussion. It is argued that the above words indicate an intention on the part of the Legislature that all borrowed moneys should rank *pari passu*, and that the reasoning of the learned Judge in *Murray v. Scott*, above referred to, applies to this case. A moment's consideration will be sufficient to show that this is not the case. In *Murray v. Scott* the provision of the society's rule was that "any borrowed money shall be a first charge on the funds and property of the society." In the present case there is simply the general provision that the society's capital shall be liable for the amounts borrowed. The same species of difference exists between the cases as would exist between the cases of a promissory note and a specific lien given by an individual, in regard to the incidents of the debt upon the debtor's property.

It will sufficiently appear, we think, from what has been said, that the approved view at the present day of the powers of corporations, strongly favours the doctrine of general capacity.

F. P. BETTS.

LONDON, ONT.

*(To be concluded.)*

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## EDITORIAL REVIEW.

**Fire Insurance—Goods Sold but not Delivered.**

An important award has been made by His Honour Judge Morgan, junior Judge of the County Court of the County of York, on this point. The dispute was between Darling, the insured, and several insurance companies. Darling was a wholesale dry goods merchant. He had laid in a large stock of goods, and a portion of the stock had, for the purpose of filling orders for them, been cut into suitable lengths, but at the time of the fire they lay in his warehouse undelivered. The insurance policies covered goods "sold, but not delivered," and the companies did not dispute their liability, but disagreed with the insured as to the mode of arriving at the value of these particular goods. The loss was paid in so far as the actual cost of the goods was concerned, and the question referred was whether an additional sum should be paid upon the goods sold but not delivered.

The claim made by Darling was put on either one of two grounds: (1) That he should recover the price at which he had agreed to sell the goods; or (2) that he should recover the actual cost price, plus the expenses incurred in buying and selling the goods. He also claimed that, if the goods had not acquired a new value, in any event the value of a certain quantity of them which could not be replaced in time to fill the orders for them should be arrived at in one of the above ways. The arbitrator gave effect to none of these claims, but decided that the actual cash value of the goods sold but not delivered should be taken as the loss; that this value was the same as goods not sold, and that it was the cost of laying down the goods in the warehouse, not including travelling buyers' expenses, nor any charges or expenses incurred in the business after the goods had passed into stock.

The learned arbitrator's reasons are as follows:

"It is fairly well established law that, in mercantile insurance, in estimating the loss, the test is 'the

value of the thing insured at the time and place of the fire.' At first blush it would seem that the price at which the goods had been agreed to be sold and bought should be the true value thereof, and the basis on which the insured, Robert Darling, should be paid for the same; and an American authority, to be found in 16 B. Monroe, Kentucky Reports, at page 242, goes a very long way in that direction, but the facts and circumstances of that case are not similar to those involved on this reference, and on a full consideration of the matter I am of opinion that this cannot be the basis or test on the facts of this case. The stock of goods was insured as a wholesale stock; its value to the insured while it remained unsold was surely only what it had cost him to buy it and lay it down in his warehouse; if he was selling it out as a wholesale stock, or if he was taking stock for his own information, or if stock were being taken by an assignee, or if it were necessary to value the stock for any other business purpose, without doubt the basis of the sale, or of the stock-taking or valuation, would be the cost price, as hereinbefore defined, and not the price he could sell it at to customers, which price would be either an arbitrary one fixed by himself to cover costs of handling that stock with a reasonable profit to himself in addition, or would be such other price as his customers were willing to give. The expenses incurred in carrying on his business, such as wages, rent, insurance and interest, etc., in no way increase the actual value of the goods, but are really only terms of gross profit added on to the prime cost to enable the merchant to carry on his business without loss and with profit to himself. Can it be said that the mere fact that an executory contract has been made to sell the goods at the prime cost with the gross profit added, increased the insured value thereof? These contracts might never be executed, and if executed the goods might not be paid for, and to say that the insured value of the sold goods was the contract price would, in effect, be to insure the performance of the contract, and also to make the policy cover both gross and net profit, which is not covered unless so expressly provided for in the policy.

"If the goods agreed to be sold and delivered had been delivered, they would on delivery have ceased to be covered by the policies, even though remaining in the premises where insured; while they remained undelivered the policy would only cover them in the character in which they were insured, namely, as a part of the general wholesale stock, to be valued as wholesale stock in the same manner and on the same basis as the residue of the stock which had not been agreed to be sold. That the actual prime cost, or 'cost price,' is the basis on which the loss should be adjusted is practically admitted by insured as to the goods in respect to which there were no contracts for sale and delivery, for it is on that basis that the loss was adjusted as to the whole stock, the insured only contending for his sale price, being the value of the goods which he had contracts to sell, and in this reference claiming as to these goods the difference between the prime cost, which he has been paid, and the price at which he had made contracts to sell. . . . It seems to me that to give effect to the contention of the insured would be to enlarge the scope of the policies and make them cover, not only the actual value of the goods, but also insure the completion of all contracts for the sale of the goods, and the realization of the gross profit consequent on such sale.

"The insurers had the right of replacement within a reasonable time, but instead of exercising such right they say to the insured, we will give you a sum sufficient to insure the replacement of the goods, such sum being the 'cost price' of the goods, as above defined. Are they required to do more? Do the policies require them to replace within such time as would enable the insured to complete his contracts for sale of the goods? Do the policies cover any loss that might arise from the inability of the insured, or the companies to replace in time, to execute the contracts? I think not.

"On the whole case I am of opinion that the insured, Robert Darling, is not entitled to be paid by the insurance companies above named, or any of them, any sum whatever in respect of the matters to me referred, and I so award, order and adjudge."

## THE COUNTY OF YORK LAW ASSOCIATION REPORT FOR 1896.

There are at present 365 members of the association; 39 members have not paid their fees for the year. During the year 7 practitioners became members, and 14 members severed their connection with the association by removal from the county and resignation.

There are now 3,221 volumes in the library, made up as follows: Reports, 1,925 volumes; text books, 962 volumes; statutes, 334 volumes; total, 3,221 volumes. Two hundred and eighty-four volumes were added to the library during the year, made up as follows: Reports and periodicals, 177; text books, 86; statutes, 21; total, 284 volumes. The principal purchase made during the year consisted of 34 volumes of the Weekly Reporter, which completed the set in the library. Donations were received as follows: From Mr. Christopher Robinson, Q.C., 88 volumes (including a complete set of Howell's State Trials); from Messrs. Mowat, Langton & Mowat, 10 volumes; from the American Bar Association, 18 volumes; others, 17. The trustees are very desirous of doing everything in their power towards increasing the usefulness of the library to the members. It may be pointed out, in this connection, that a book is kept in the library for the purpose of receiving suggestions for new books.

The curator, who has recently given the matter some consideration, is anxious to ascertain the views of the members with regard to introducing American reports into the library. The County of Middlesex Law Association has made a beginning in this direction, and has now on its shelves the National Reporter series, issued by the West Publishing Company, as well as the United States Supreme Court, Circuit Court and Federal Reports. It may be well worthy of consideration whether, in view of the number of standard text books of American origin, a beginning might not now be made with

some of the reports of the Federal Courts of the United States, as distinguished from the reports of the state Courts, though possibly those of New York and of Massachusetts would be found useful.

In view of the increased accommodation in the new court house, to which your trustees are now hopefully looking forward, the trustees desire to direct the attention of the members of the association to the fact that they are always ready to receive donations, and would particularly mention Canadian statutes of any date. An effort is now being made to have more than one set of the Canadian statutes, and for several years the statutes and reports of all the provinces have been systematically collected. Members must frequently have on their shelves odd legal volumes, "in splendid isolation," which would be of great value in combination with those already possessed by the association.

The sittings of the Courts for the trial of non-jury cases will shortly be held entirely in the court house; and it behooves the association to keep abreast with the additional demands which will thereby be entailed upon their resources, and to maintain their position of having the best working law library in the province, outside of Osgoode Hall.

The president, Mr. G. F. Shepley, Q.C., has presented to the library a portrait of Mr. J. A. Worrell, Q.C., his predecessor. The set of portraits of past presidents now forms an interesting collection.

During the year the County Commissioners have provided a store-room in the court house, which has furnished much-needed additional space for storing books.

The commissioners appointed to consolidate the Rules of Practice have forwarded to the trustees a memorandum printed for distribution amongst the profession and others, with a view to obtaining suggestions with reference to the consolidation and amending of the rules. The memorandum contains suggestions of many important changes in the rules, and has been referred to the Committee upon Legislation. Time has not yet been afforded to this committee to prepare a report.

The trustees have given much attention during the past year to the arrangements proposed in the new court house for the accommodation of the Bar. It is believed that provision will be made in the court house giving ample space for the library for many years to come, and affording perfect accommodation for reading and consulting rooms.

The trustees desire to call the attention of the members to the fact that a large number of barristers resident in Toronto have never become members of the association. Many of them, however, do not hesitate to use the library. Many others decline to join upon the ground that the library is not a necessity for them.

The Board of Trustees desires to point out that it has for eleven years charged itself with the business of looking after the interests of the Bar, and on numerous occasions has been able to protect these interests in a way that would have been impossible had the organization not existed. The success of the organization depends upon its having a large membership. The efforts of individual members are requested to increase the membership.

The library and affairs of the association were inspected in October by Mr. W. G. Eakins, librarian of the Law Society of Upper Canada. His report is most complimentary to the association. He points out that the association's affairs are managed on strict business principles; that it maintains a large, well-managed library, and is active and progressive in its efforts to advance the interests of the profession at large.

The treasurer's accounts have been duly audited, and the report of the auditors will be submitted for your approval.

The librarian's report on the work of the year is also submitted.

All of which is respectfully submitted.

25th January, 1897.

GEO. F. SHEPLEY, *President.*

WALTER BARWICK, *Treasurer.*



# THE CANADIAN LAW TIMES.

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MARCH, 1897.

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## OF THE BORROWING POWERS OF BUILDING SOCIETIES.

*(Concluded.)*

IT will be well, having examined the cases bearing on the powers of corporations generally, to consider now the cases dealing with the particular species of corporation, viz., building societies, at present under discussion.

It will be readily understood that, building societies being a species of corporation of comparatively recent growth, a large part of the law relating to them is of modern origin. The first building society of which there is authentic record would seem to have been established at Kirkcudbright, in Scotland, by the Earl of Selkirk in 1815 (*m*), though it would appear from references in an article on the subject in the *Encyclopædia Britannica* (IV. 513) that some organizations in the nature of building societies existed in Birmingham under the name of "building clubs" as early as 1795. There appears also (*n*) to have been one at Greenwich in 1807. In the United States the first association of the kind was established at Brooklyn in 1836.

Since the establishment of these societies the law in relation to them has been extensively canvassed in the English as well as in our own Courts. The approved

(*m*) *Bibb County L. Association v. Richards*, 21 Ga. 592.

(*n*) *Pratt v. Hutchinson*, 15 East, 511.

views in England upon the subject generally, as well as upon the particular phase of it at present under consideration, may be gathered from a case of *Murray v. Scott* decided by the House of Lords in 1884 (o).

We have thought it worth while to deal somewhat in extenso with this case, as the decision is an important one, dealing at length with the subject under discussion, and being of the Court of ultimate resort. It is a case, moreover, which has been relied on by those who doubt the power of building societies to borrow on the security of their mortgages. The decision there certainly was that the society had no power to borrow money, giving as security therefor the mortgages upon its assets; but a closer examination of the case makes it apparent that this decision turned entirely on the peculiar provisions of the rules or by-laws of the society defining its borrowing powers.

A careful perusal of the judgments in the case will, we think, make it apparent that their Lordships' views of the law upon the subject would make entirely for the affirmation, not at all for the negation, of the power in question in the case of building societies as constituted and governed in Ontario. The society in question in *Murray v. Scott* was a benefit building society, its object being, as defined by the rules, "to realize by monthly subscriptions, fines, interest and other payments and the accumulations thereof, £120 for each share and £60 for each half share, to be advanced to the members of the society for the erection of buildings or purchase of real estate or leasehold estates on mortgage of such buildings or estates, or paid upon the terms and in the manner hereinafter mentioned." There was also a provision in the rules for the division of the society's moneys from time to time, after providing for certain contingencies, among the shareholders. One of the rules of the society authorized the directors to borrow from any persons, and provided, "And any borrowed money shall be a first charge on the funds and property of the

society, and in case the trustees or directors shall at any time give their joint and several promissory note or other security for money borrowed for and on behalf of the society, then, and in such case the persons giving the security shall be indemnified by the society, and the funds and property of the society shall be held subject and liable to the repayment of the borrowed moneys; the borrowed moneys being always deemed a first charge on the society's funds and property."

It is of importance to bear in mind that the society under consideration in this case was a building society pure and simple, as contradistinguished from a society of the nature of those at present doing business in Ontario under the Building Societies' Acts, which latter, through the various legislative modifications of their constitutions, have become so altered in character, and acquired such extended powers as to have well nigh lost their original character of building societies—a term which seems now almost a misnomer as applied to them. The term "loan company" much more aptly characterizes the nature of their business at the present day.

This difference in the objects and scope of the two classes of societies has, we think, an important bearing upon the question now discussed. In *Murray v. Scott* this question was directly under consideration. Prior to the decision of this case, it had been taken for granted rather than decided that a rule of a society of the nature of those under discussion, purporting to confer an unlimited power of borrowing, was invalid. The Chancellor in this case takes the liberty of differing from that view of the law, and points out, moreover, that "when the authorities which were supposed to establish this proposition are referred to, none of them are found to be really decisions upon that point; they all seem to depend upon a dictum of Lord Hatherley in the case of *Lang v. Reed*, L. R. 5 Ch. 4, 8."

The Lord Chancellor goes on to say: "I subscribe to the doctrine laid down in the same case by Giffard, L.J., that the test ought to be whether the rule (not being contrary to any express prohibition in the statute) was

one which made the society a thing different from a benefit building society. If not, and it merely provided a method of conducting business (i.e., the proper business of a benefit building society), it could not be illegal or ultra vires." Again, in the same judgment the Lord Chancellor says: "The only real and true limit of the rule-making power as to a matter not governed by the general law of the realm or by any prohibition in the statute, must be that pointed out by Giffard, L.J.; the power cannot be so exercised as to make the society a thing different from a benefit building society formed for the purposes and in the manner defined by the Act."

The ground of disallowance of the specific lien claimed by certain creditors upon the assets of the company under certain equitable mortgages, clearly appears in the Lord Chancellor's judgment at p. 539, where he says: "I think that this claim is clearly inconsistent with the true meaning of that rule, which I understand to be, that all moneys borrowed under it are to have the benefit equally and *pari passu* of a first charge upon the general funds and property of the society. If the directors could pledge particular assets of the society to particular lenders under that rule, the other lenders under the same rule would be deprived *pro tanto* of that first charge which the rule gives them, and the successive borrowing operations would have a different incidence upon the funds of the society from that intended and authorized."

Regarding the validity of the pledges of specific mortgage securities of the company to the various lenders thereon, Lord Blackburn says (p. 556): "If there had been an express clause enabling them to mortgage specifically property of the society, I think that the reasoning I have submitted to the House leads to the conclusion that the specific pledges would be good. And the same would perhaps follow if such a power to pledge specific property was implied. But there is certainly no express power to pledge given, and I think that the terms of the rule which make all the loans a first charge on the funds, which would lead the lenders to believe that, in the event of a winding up at least,

they would all come in *pari passu*, are quite sufficient to negative an implied power to mortgage, even if such a power could be implied from a power to borrow."

Lord Watson, in the same case, in coinciding with the judgments of his brother Judges, says, referring to the position of those creditors who had made advances to the company upon the security of pledges of the mortgage securities held by the company (p. 559): "What would have been the precise rights of those creditors if Rule 32 had not contained the declaration that any borrowed money shall be a first charge on the funds and property of the society, and if there had been added to the rule the further declaration that it should be lawful for the directors to give the lenders such form of security as might be legal, and as the directors might deem proper, are questions which I do not think it necessary for the purposes of the present case to determine. The rules of this society do not give, at any rate do not expressly give, authority to the directors to borrow on mortgage; and the declaration in Rule 32 appears to me to be so expressed as to qualify the power of the directors, and to fix the security which is to be given alike to all lenders to the society. As the rule stands it conveys an intimation to lenders that all loans are to constitute a first charge upon the assets of the society, and it would, in my opinion, be inconsistent with any reasonable construction of the rule to hold that the directors were thereby authorized in the first place to borrow largely on the faith of that intimation, and then to make over the whole property and funds available for payment of these loans in pledge to preferable creditors. I have, therefore, come to the conclusion that lenders holding specific securities must nevertheless come in *pari passu* with unsecured creditors who have advanced money to the society in reliance upon Rule 32."

It will sufficiently appear from the above, both upon what grounds the learned Judges in *Dom. Proc.* based their decision (clearly the express provisions of the society's rule), and also their general view of the law relating to the question under discussion. It is worth

while noting, however, before leaving the case, that the question of implied powers of borrowing is also dealt with.

It was, in fact, specially argued by Sir Horace Davey, Q.C., that "apart from authority it cannot be said that borrowing is so far outside the scope of a building society, that a society having power to borrow is of a different class from that authorized by the Act 6 & 7 Will. IV. c. 32," the contention being urged that though no express power was given by the Act it was not necessary (*p*), that such a society has implied power to purchase land, provided it is bought for the legitimate purposes of the society.

Dealing with this point in his judgment, Lord Blackburn quotes Lord Justice Giffard's remarks in *Re National Permanent Building Society, Ex parte Williamson*, L. R. 5 Ch. 312, as follows: "This company is what is called a benefit building society. Until the recent case of *Lang v. Reed*, L. R. 5 Ch. 4, it was doubted whether even if you put a limited borrowing power among the rules of a society of this sort that particular rule would be legal. But what we have here is a limited benefit building society without any power to borrow and the rules and very nature of that society shew that it would be contrary to its constitution to borrow money so as to bind the company, or to make the individual members of the company as members liable for borrowing money; because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules they are to receive certain loans," and observes thereon, "what is here decided is that a society under this Act has no power to borrow unless its rules authorize it so to do, and that is, I think, as well settled to be law as anything not yet decided by this House can be."

(*p*) *Mullock v. Jenkins*, 14 Beav. 628; *Grimes v. Harrison*, 26 Beav. 485.

In *Re Professional, etc., Building Society (q)*, James, L.J., said: "A society of this kind is not entitled to borrow money except under a particular rule. It is no part of its business to borrow money. It may incur debts, no doubt, to a certain extent. It must, for instance, incur office rent, and employ a solicitor and a secretary, and to that extent probably there is always some small amount of debt which every body of this kind must incur. But beyond this, it is very difficult to see what debts it could legally incur."

Upon the same point, see also *Dewhurst v. Clarkson (r)*, and *Kelsall v. Tyler (s)*.

Sir Richard Bethell, afterwards Lord Westbury, in 1857, when Attorney-General, gave an official opinion that a rule authorizing the raising of money for the purpose of the society, would be repugnant to the fundamental principles of the society. This opinion was questioned and subsequently judicially disapproved. (*Laing v. Reed*, Sup.) And the English Legislature by their Act of 1874 (see s. 15) made it apparent that they did not think it expedient to adopt Sir Richard Bethell's opinion.

Having now ascertained the law upon the subject in so far as it appertains, first, to corporations in general and, secondly, to societies of the nature of those constituted under the English Act 6 & 7 Wm. IV. c. 32, etc., the scope and objects of which have been already set forth, we are now in a position to deal with the question more immediately under discussion, viz., that relating to the powers of building societies incorporated under the Ontario Acts. To arrive at a just conclusion upon the question, it is of importance that we examine carefully into the nature of the Ontario societies, with a view to ascertaining what points of difference, if any, exist between them and the English associations, and of determining, as far as possible, what effect such differences as may be found existing would be likely to have in the application of the general principles of law in question to the former societies.

(q) L. R. 6 Ch. 857.

(r) 8 E. & B. 194.

(s) 11 Ex. 518.

Our societies owe their constitution and powers to the Canadian Acts respecting building societies, with the various amendments and modifications thereof, and the rules and by-laws which the societies themselves have legally passed. An examination of these discloses the fact that though originally the Ontario societies were bodies with very similar constitutions and powers to those of the English associations, their object being to raise by periodical subscriptions a fund for the purchase or erection of dwellings for the members, yet in course of time these original objects have been almost entirely lost sight of, and by the acquisition from the Legislature of greatly extended powers (*t*), the societies have assumed the character of investing companies, whose object may fairly be stated to be the acquisition of profits for their shareholders by means of the investment of the societies' funds at remunerative rates.

It will be apparent to anyone who will give the matter a moment's thought, that it is a very different thing to claim the power of borrowing upon the security of its property for a company of the character of the present day Ontario building societies, so called, in other words an investment company, and for an organization which is in fact a building society pure and simple, such as the English associations were, or the Ontario societies in their early days. Monetary transactions which might have been quite out of place, and manifestly improper, in the case of the latter organizations, which would, as Giffard, L.J., expressed it (*supra*), make the society a "thing different from a building society," would, in case of the former, assume the complexion of acts done in the ordinary course of the business of the society.

If a company is to be recognized, as our Ontario building societies have been by the Legislature, as an institution dealing with money, whose main business is the investment of money at a profit, and whose financing must include a capacity to meet obligations (incurred also with the sanction of the Legislature, as on

(*t*) See 22 Vict. c. 45; 39 Vict. c. 32, s. 6; 40 Vict. c. 22, s. 1; 41 Vict. c. 7; 49 Vict. c. 34, etc.



debentures) maturing from time to time, we contend that the rule conceding to corporations all powers necessary to the full carrying out of their objects must be applied to such a company in a very liberal spirit.

It is quite conceivable that if the power in question were denied to such a company, the consequences to its financial standing might, under certain circumstances, be most disastrous. Assume the case of a sudden financial stringency, such, for instance, as has been witnessed more than once in the money markets of our neighboring republic within very recent years. A building society has large amounts of debentures maturing; it has also, let us suppose, large amounts of choice mortgage securities in its vaults, the very form of security, be it remarked, that would be most likely, at such a period, to allure timid capital from its strong boxes. Is such a society to be told, "No; it is quite true you have ample security to offer, and that of the kind we should consider most desirable, but we cannot advance to you upon that security because you are not empowered to hypothecate it as security for the loan?" It will be said, the society is fully empowered to sell its securities out and out, so that the supposed case of hardship could not occur. To this we reply, first, that such an answer may indicate its own refutation, inasmuch as if the power to sell outright exists, as in this case it undoubtedly does, the power to mortgage may well be held in such a case to be thereby implied (*u*), and, secondly, that where, as in

(*u*) The question as to whether a power to sell implies a power to mortgage is too lengthy to admit of treatment here; suffice it to say that the cases on the subject are not by any means free from conflict. In general it would appear that the burden of proof is upon the party propounding the power to mortgage. It would seem, however, that one distinct class of cases exists in which the presumption is in favour of the existence of the power. This is the case where there is "an unrestricted power to sell, coupled with an absolute interest on the part of the donee, as in the case of a corporation authorized by its charter to purchase lands and to sell and dispose of them for its own benefit." In such cases the power to mortgage would probably be held to exist. How closely the case referred to approximates to the one under discussion will at once appear. See also *Platt v. Union Pacific Ry. Co.*, 99 U. S. 48, *supra*. The dictum of Chancellor Kent on the subject may also well be referred to: "The better opinion would seem to be that a power to sell for the purpose of raising money will imply a power to mortgage, which is a conditional sale within the object of the power": Kent's *Com.* 11th ed. 161. See an article on the subject by Mr. A. H. Marsh, Q.C., in 1 C. L. T. 21.

Ontario at the present time, desirable mortgages are limited in number, and not to be procured without considerable trouble and expense, it is not by any means a mere sentimental hardship that a society should be compelled to part outright with securities of that nature for the purpose of supplying a mere temporary want. The argument *ab inconvenienti* would be in this case very strong..

But as we view the matter, it is not even a question of being relegated to arguments of that character. We think that even those in whose minds the doubt as to the existence of the power in question is strongest, would readily admit that a Court would be likely to approach the question with a very strong inclination towards affirming the power, and would only be inclined to negative it in case the legislation or the case law upon the subject proved too strong to be gainsaid. For ourselves, we do not think any very formidable obstacle arises from either of these sources.

So far as the lending society is concerned, sections 31 and 33 of R. S. O. c. 169, give it express power to make the advance. The kinds of securities on which these societies are authorized to make loans are expressly mentioned in s. 33, and are as follows: "Mortgages of real estate, debentures of societies incorporated under the Building Societies' Acts, debentures of municipal or public school corporations, Dominion or provincial stock or securities" ; and it is worthy of observation that the same section provides that a building society may make advances to any person or body corporate upon such securities (v).

Perhaps it would not be unfair to derive an argument from the words "body corporate" in favour of the power now contended for. It is plain from those words that the Legislature contemplated the acceptance of advances by some kind of corporation on the specific security of

(v) Section 66 also provides that the society may lend to any person or body corporate without requiring the borrowers to become members of the Society. The Rules of the Societies also provide for loans to bodies corporate. S. 67 gives the Society power to "do all acts that may be necessary for advancing money."

real estate mortgages. The Legislature is at the time dealing with that species of corporation, to wit, building societies, which has among its assets an immeasurably larger proportion of such mortgages than any other kind of corporation. One would naturally suppose, therefore, that if the Legislature meant to interdict that species of transaction in the case of building societies, they would have placed the matter beyond peradventure by expressly providing that such societies should have no such power. The argument in opposition to this proceeds, of course, upon the doctrine of "special capacities" before referred to, the force of which, as applied to building societies at the present day, we have already endeavoured to combat.

So much for the powers of the lending society, which would seem to be indubitable. Let us turn now to the legislative provisions, in so far as they relate to the capacity of the borrowing society. We have already referred to the various Acts amplifying the borrowing powers of building societies. One of the most radical of these is 39 Vict. c. 32. It indicates the attitude and general policy of the Legislature towards these societies. It provides, amongst other things, that loans may be made to other than members, thus evidencing a disposition to countenance the casting off by the societies of those trammels which had theretofore bound them as building societies, and to recognize their changed character of investment companies.

The same Act also confers the power of issuing debentures, thus again enlarging their borrowing powers, and in the succeeding section is found the following provision: "The president, vice-president and directors of any permanent building society . . . may enter into all contracts for the execution of the purposes of such society, and for all other matters necessary for the transaction of its affairs; they may generally deal with, treat, sell and dispose of the lands, property and effects of such society for the time being in such manner as they shall deem expedient and conducive to the benefit of such society, as if the same lands, property and effects were held and owned according to the tenure and

subject to the liabilities, if any, from time to time affecting the same, not by a body corporate, but by any of Her Majesty's subjects being of full age."

This is a very sweeping provision, and when taken in conjunction with the following facts: (a) That the enactment, which is repeated both in the Dominion and provincial legislation (37 Vict. c. 50, s. 8; R. S. O. c. 169, ss. 73, 74), is accompanied in both cases by a provision in the following words: "The president, vice-president and directors of any such society shall have and exercise the powers, privileges and authorities set forth and vested in them by this Act, and any other Act regulating such society, subject to the rules or by-laws of such society, and they shall be subject to and be governed by such rules, regulations and provisions as are herein contained with respect thereto, and by the by-laws of such society; and (b) That the rules or by-laws of these societies expressly provide that "the directors are authorized to borrow money for the use and on the assets of the society," may fairly, we think, be taken to clinch the matter.

There are, however, other indications both in the legislation and by-laws that the power in question falls well within the functions of the societies. Section 32 of R. S. O. c. 169, provides that the society shall have power to sell, dispose of and assign mortgages made directly to it in the same manner as it may sell and assign mortgages purchased by it. The provision as to its powers of selling the latter class of mortgages is (s. 33) that it may sell any such securities as to it seems advisable. We shall have occasion to refer further to section 32 later. Section 81, R. S. O. c. 169 (s. 17 of the Dominion Act, 37 Vict. c. 50), referring to the amalgamation of two building societies, provides that all liens upon the property of either society shall remain unimpaired. Section 83 of the Revised Statutes, clause (c) (section 19 of the same Dominion Act, repealed and re-enacted by 43 Vict. c. 43, s. 5), provides that the annual Government statement shall shew the amount borrowed for the purposes of investment and the securities given therefor. "Securities," by the interpretation clause,

include "mortgages (equitable as well as legal) and incumbrances upon real and immovable estate," etc.

R. S. O. c. 169, s. 92, confirming the acts of such societies, mentions "debentures, mortgages, bonds, deeds, etc., executed by or to any building society." So that it is clear the Legislatures contemplated the creation by the societies of mortgages and liens upon their property.

Turning to the by-laws of the societies, we have already referred to one expressly authorizing the directors to borrow on the assets of the society. There is another giving them full power to buy, sell and convey the societies' securities. It will appear, therefore, that the evident policy, both of the Legislature and the members of the society, as indicated by the statutes and by-laws, is to give the directors a free hand in dealing with the property and transacting the business of the society.

Some stress has been laid by those who doubt the existence of the power in question, upon the fact that the Legislature in 1878 thought it necessary to pass an Act (41 Vict. c. 7) empowering the societies to sell mortgage securities made directly to them, as though it furnished an argument in favour of their view. To our mind, on the contrary, it seems to furnish strong corroboration of the line of argument we have endeavoured to present in favour of the power.

It will be seen that the form this piece of legislation takes is (a) a recital of the fact that doubts exist as to whether a society incorporated under the Act respecting building societies has power to sell or dispose of mortgages made directly to the society, and (b) a declaratory enactment to the effect that a building society has heretofore had and shall hereafter have such power. The power had certainly never theretofore been expressly conferred upon the societies by any legislative enactment, so that, as the statute declares that it existed nevertheless, we have here an instance of the Legislature itself affirming the doctrine of "general capacity."

Before leaving the subject it is of importance to refer to an Act passed by the Ontario Legislature in 1891 (54 Vict. c. 59), section 2 of which provides that "any

society incorporated under the Act respecting Benevolent, Provident and other Societies, or under any other Act in force in this province, in addition to the powers therein contained as to raising money on the security of its property, shall have the right to borrow money on debentures, and for that purpose may issue debentures, pledging all the real and personal estate of the society for the payment of such debentures."

This is very significant. Even supposing the Act not to apply to building societies, a supposition the legitimacy of which we are by no means disposed to concede, the general policy and attitude of the Legislature towards the powers in question are disclosed in a quite unequivocal manner, and, to our minds, give a quietus to such arguments as have been derived by those who take the adverse view from the case of *Murray v. Scott*, *supra*.

The decision in *Murray v. Scott*, as already pointed out, proceeds entirely upon the peculiar provision of the society's rule, to the effect that all borrowed money should be a first charge on the property of the society, a provision which is not found among the rules of the other societies concerned (*w*).

It should be borne in mind, also, that the Ontario societies are given extensive borrowing powers by direct legislative enactment, whereas the English society in question had none, and was obliged to rely solely, apart from the question of implied powers, on its rule.

The existence of this provision is the crucial point. Obviously, in the face of it the society could not be permitted to give preferential claims to certain lenders; such an attempt would be in direct contravention of the condition of things expressly provided for by the existing legislation. In the absence of such a provision, the

(*w*) The form of Rule relating to borrowing generally adopted by Building Societies in Ontario is substantially as follows: The directors are authorized to borrow money for the use and on the assets of the company; to receive money on deposit in large or small sums, and to pay such interest therefor and under such regulations as they may from time to time deem advisable, and to issue and dispose of the debentures of the company.

case does not apply, and, so far as any argument derivable from the general opinions of the law upon the subject delivered by the learned Judges in the case are concerned, the trend of such arguments is emphatically, as we have endeavoured to show, in favour of, and not against, the existence of the power. The opinion of our own Legislature, as to what the law is and ought to be upon the subject, may be gathered from the enactment last referred to, and will be found to coincide in the main with the views of the learned Judges in *Murray v. Scott*.

F. P. BETTS.

LONDON, ONT.

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## EDITORIAL REVIEW.

**The Arbitration Act.**

The case of *Re Caughell and Brower*, 17 Occ. N. 46 which appeared in our last number, again revived the discussion as to when a motion must be made to set aside an award made upon a voluntary submission. The Court of Appeal pointed out the necessity, which we may add is imperative, of a complete revision of the legislation respecting awards and proceedings by way of appeal therefrom and to set them aside.

Of all the refractory Acts (to use a mining term) in the statute book, perhaps the Act 52 Vict. c. 13, is the most refractory, and yields less intelligent meaning to a careful study and analysis of its provisions than any other enactment. R. S. O. c. 53, s. 18, not having been repealed (fortunately), the old practice as to moving within the following term remains. That is the only safe thing that can be predicated. The Amending Act of 52 Vict. was probably intended to supersede it, but its provisions are so obscure that no sooner is a probable meaning extracted from one section than it is immediately shown to be improbable by resort to another section.

On the very threshold of the Act we meet with difficulties. By section 18 of the principal Act a motion to set aside an award "where an appeal does not lie" may be made as heretofore. Section 1 of 52 Vict. makes sections 4, 6 and 7 apply to all arbitrations. Section 4 declares that a motion "to set aside an award" shall be made within fourteen days from filing the same, unless the Court or a Judge shall "allow an appeal" after fourteen days. Does this apply to appeals on the evidence, or to



motions to set aside? So far it has been held not to apply to motions to set aside. Then, section 6 (which applies to all arbitrations and therefore to those where an appeal lies) declares that an application to set aside an award "to which section 4 does not apply" shall not be made after three months from the making of the award. Now section 4 applies to all awards, and therefore there are no awards which are not within section 4, and consequently none to which section 6 can apply. It cannot, however, remain a dead letter, and the only sense to be given it is to apply it to cases of setting aside awards for corruption, etc., restricting section 4 to appeals on the evidence.

An attempt has been made to harmonize the two sections in another way, viz., by arguing that where the fourteen days mentioned by section 4 have expired, the section no longer applies, and therefore section 6 will apply to limiting the time to which the extension to be granted by section 4 may be given. This is unsatisfactory because, in the first place, it is uncertain whether section 4 applies to setting aside or appealing; and, in the second place, section 4 does apply if an extension of time is asked for. The second consideration effectually shuts out section 6, and prevents it from forming a limit of time under section 4.

Even the first suggestion does not entirely clear up the matter; for if section 6 stands alone as applicable to motions to set aside awards (restricting section 4 to appeals), the old limit of time preserved by section 18 of the principal Act has to be reckoned with, viz., the term following the publication of the award. We then have two enactments as to motions to set aside awards; one, that a motion must be made in the next term, and another, that it must not be made after the expiration of three months. Section 6 does not profess to give the whole three months as a limit, but only to prevent a motion after that time. If applied to the old practice it is possible to make it result in preventing a motion altogether. For instance, Hilary Term began on the first Monday in February and lasted two weeks. Easter

Term began on the third Monday in May. The first Monday in February, 1897, is the first of the month, and Hilary Term would end on 13th February. If an award were made on 15th February, three months would elapse on the 15th May. But Easter Term would not begin until 17th May, and so no motion could be made during the term following the award to set it aside. It may be said, however, that section 6 was passed having regard to a practice now existing whereby a motion may be made in any week. That is a perfectly just argument, but the whole result of the section would be, in the case suggested, to cut two weeks and a day off the time for moving; not a very serious matter if left alone.

This does not, however, exhaust the eccentricities of the Act. By the first section, sections 2 and 3 apply to cases in which an appeal does not lie. Now section 2 allows such an award to be filed with the submission, and by section 3 to have, when filed, the effect of a rule or order of Court. That is, there being no appeal from it, the successful party may proceed to its enforcement immediately. But section 4 immediately follows with this pronouncement: "A motion to set aside an award or certificate which is filed under . . . this Act" shall not be made after fourteen days from filing, unless an appeal be allowed after that time. By section 1 of the Act section 4 applies to a totally different class of cases from those affected by sections 2 and 3, but by its own terms it applies to the very same cases referred to in sections 2 and 3.

We do not pretend to have exploited the whole Act. There are, no doubt, other peculiarities. Section 1 makes the whole Act apply to municipal arbitrations. But these are specially provided for by the Municipal Act, and in such a way that the two enactments cannot be reconciled. On the whole the Act wears the reputation of being utterly impossible to interpret, and the Legislature could not accomplish a more welcome and wholesome task than to adopt the recommendation of the Court of Appeal, or repeal it and re-enact an entirely new statute.

**Mortgagor and Mortgagee—Fixtures.**

An important case on the law of fixtures, as between mortgagor and mortgagee, has lately been decided by the Court of Appeal in England—Hobson v. Gorringe, 13 Times L. R. 139; L. R. (1897) 1 Ch. 182. It appeared that the plaintiff let to the mortgagor, on a hire and sale agreement, a gas engine for the purpose of working a saw mill on his premises. The engine was annexed to the soil in such a way as to become part thereof. Subsequently the mortgagor granted the land in mortgage to the defendant, and on his becoming bankrupt the mortgagee took possession. The plaintiff then sued him for the recovery of the engine, on the ground that, though it was annexed to the freehold in fact, yet in law, as it remained the property of the plaintiff until paid for under the agreement, it was in reality a chattel, and did not pass by the mortgage of the freehold to the defendant, for the real intention of the parties should govern. Mr. Justice Kekewich, however, gave judgment for the defendant mortgagee, and the Court of Appeal affirmed it.

Lord Justice A. L. Smith, in delivering the judgment of the Court, said: "It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine becomes a fixture—i.e., part of the soil—when it was annexed to the soil by screws and bolts, subject as between Hobson and King [the mortgagor] to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the contracted monthly instalments. In our opinion, the engine became a fixture—i.e., part of the soil—subject to the right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gor-

ringe is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract." The plaintiff's only remedy in that aspect was an action for the price, or for damages for breach of the agreement and loss of the chattel. The result of this case is that the proper mode of reasoning is to make the annexation to the soil, whereby the chattel becomes part of the soil, the premises, and then deal with the effect of the agreement to unfix that which is de facto affixed. In some of our own cases the opposite mode is followed, viz., to attribute to chattels a continuity of that character on account of the agreement, and to disregard the actual fact of annexation to the soil. Following premises in the English decision, the proposition easily reaches a conclusion. The nature of a contract to unfix is such that it does not run with the land or create an interest in or upon the land. It is a personal contract affecting only the parties thereto. It has this further effect that if notice of it is given to a proposing purchaser, he will take the consequences of disregarding the notice. That the nature of the proposition and reasoning in this case is sound is apparent. In other words the proper enunciation of the proposition is that the chattel becomes a fixture, or part of the soil, for all purposes, liable to be unfixed under the contract; and not that it never becomes a fixture on account of the contract. If we look at the nature of the contract itself, it appears at once to have been entered into solely because the article will, and is intended to, become part of the soil. It is not made to prevent its being affixed. The intention is that it shall be affixed. The contract is to enable the vendor to detach it and save the consequences of the actual physical fact. This is clearly shown in the succeeding part of the judgment. The fact of annexation to the soil is the groundwork of the whole matter. If, as a fact, the article is not affixed to the soil—*cadit quæstio*. If it is, then it is a part of the land. Then, and not before, does the written agreement become important. The fact of the fixture having been ascertained, does the agreement enable the parties to it to

detach in fact what is in fact attached? If so, the contract must be observed between the parties. But it can go no further in its effect without notice. In other words, a purchaser of the land takes the land as he buys it, unless there is some superior equity.

The decision ought all the more to be applicable to Ontario law on account of the provisions of the Registry Acts. The capability of registration exists in the case of an instrument such as this, and the failure to register it renders it fraudulent and void. It cannot be said, in the face of this decision, that the property in the fixture (which is property in land) does not pass to the hirer and therefore does not pass to his grantee. The land passes, and with it the fixture, by virtue of the Registry Act, if the agreement that it shall be liable to detachment is not registered.

#### **Innkeeper—Limited Liability.**

In *Lamond v. Richards*, 13 Times L. R. 167, the novel point was decided that a person is not entitled to live at an inn or hotel. He must be a traveller in order to raise the common law liability of the innkeeper. Otherwise he is not a guest. In the course of the argument Mr. Justice Bruce asked, "Must a hotel-keeper keep a person who stops three years?" Mr. Justice Wright: "Or what would you say to the Scotch case, in which the lady came for three months and stopped for seventeen years? Your argument comes to this—that a man might insist on remaining in the hotel for life." Again, Mr. Justice Wright, "Might one marry after going to the hotel and bring up a family there?" Mr. Justice Wright remarked in giving judgment that he had observed that counsel for the plaintiff (the guest) had had some difficulty in maintaining his gravity at certain parts of the argument, and proceeded to hold that, following *R. v. Luellin*, 12 Mod. 445, the guest must be a traveller. That case was followed in *R. v. Rymer*, 2 Q. B. D. 136. The only alternative was that the innkeeper must keep the guest for life if required.

As long as the character of the traveller is maintained the right to be received as a guest subsists. As soon as it ceases the liability of the innkeeper ceases with it. It will now be in order for some ingenious person to try how long the character of traveller can be kept up consistently with comfortable residence in a hotel. Perhaps this very plaintiff might, having received a useful hint, try the experiment. There certainly would be no answer to her application for admission if she appeared as a traveller the day after the judgment was delivered.

#### **Vexatious Actions.**

Mr. Chaffers, having distinguished himself by bringing forty-eight actions, in which some of the defendants were the Prince of Wales, the Archbishop of Canterbury, the Lord Chancellor, an ex-Lord Chancellor, the Speaker of the House of Commons, the Master of the Rolls, Lord Justice Lopes, several County Judges, the Trustees of the British Museum, the Solicitors of the Treasury and a number of other official persons, and having failed in all of them, rendered himself liable to the Vexatious Actions Act. And on the application of the Attorney-General the Court ordered him to bring no further actions without the leave of the Court. While it is a matter for congratulation that we have not amongst us that particular species of litigant, it is sometimes a matter of regret that we have not a Vexatious Actions Act to enable our Court to deal with other speculative cases.

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## BOOK REVIEWS

*Commentaries on the Laws of England.* In four books. By SIR WILLIAM BLACKSTONE, Knight, one of the Justices of His Majesty's Court of Common Pleas, with notes selected from the editions of Archbold, Christian, Coleridge, Chitty, Stewart, Kerr and others; and in addition, notes and references to all law books and decisions wherein the Commentaries have been cited, and all statutes modifying the text. By WILLIAM DRAPER LEWIS, Ph.D., Dean of the Department of Law in the University of Pennsylvania. Book I. Philadelphia: Rees, Welsh & Co. 1897.

This is a reprint of the original text of Blackstone, and, as the title page shows, is adorned with the notes of the various editors of the Commentaries. In this respect the present edition is a welcome one. Instead of being obliged to consult the various editions for variety of opinion, we have here all the notes collected in one work. At the same time, in some respects, these notes (as far as the present part of the first book is concerned) are, in some respects, misleading or defective from the point of view of English law. For instance, in the section devoted to the countries subject to the laws of England, Sharwood's note, wherein it is stated that "equally false is the doctrine asserted that these colonies [the American Plantations] were subject to the control of the Parliament," cannot be accepted as theoretically correct. The reasoning which follows may be justified by the result, but is not sound in principle. "The colonies were never represented in that body; and although the charters were derived from the Crown, and all admitted a common allegiance to the same sovereign, it did not, therefore, follow that they were subject to the legislative authority of the English people." There is a notable absence of all English and Colonial decisions on the point of the supremacy of the Imperial Parliament, a

supremacy necessarily acknowledged by the acceptance of charters of government, whether emanating from the Crown or Parliament. The absence of an index of cases renders it impossible to judge whether in another place this defect will be remedied or supplied. In like manner, the laws respecting aliens and naturalization, which have completely changed since Blackstone's time, are very meagrely treated. Though reference is made to the Imperial Acts relating to aliens and their right to hold and transmit lands, nothing is said as to colonial law in this respect; and no Canadian cases are cited as far as we can see. On these points we should doubt the validity of the claim that all cases in which Blackstone's Commentaries are cited have been referred to. It is true that only the English and American statutes are professed to be cited, but no such limitation is made as to cases on a subject which must necessarily arise much more frequently in colonial than in English Courts. This must be considered a serious defect. In other respects, however, there is a great wealth of learning to be found in the notes; and we look with interest for the succeeding parts of the work.

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*Manual of Evidence in Civil Cases.* By R. E. KINGSFORD, M.A., LL.B., of Toronto, Barrister. Second edition: The Goodwin Co., Ltd. 1897.

It is with great pleasure that we are able to announce a second edition of this little book by a most industrious author. The arrangement is already familiar to the profession. In a compact space, the essential matters to be proved in particular actions are set out, and authorities are cited thereunder. Nearly five hundred cases not in the first edition are cited in this edition, which of itself is an index of its additional value.



# THE CANADIAN LAW TIMES.

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APRIL, 1897.

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## RIGHT TO ASSIGNMENT OR RECONVEYANCE UPON REDEMPTION OF MORTGAGE.

IT is enacted by R. S. O. c. 102, s. 2, that "Where a *mortgagor is entitled to redeem*, he shall, by virtue of this Act, have power to require the mortgagee, instead of giving a certificate of payment or reconveying, and *on the terms on which he would be bound to reconvey*, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly."

The necessity for this section of the Act and the operation thereof are shown and explained by Jessel, M.R., in *Teevan v. Smith* (a).

The word "mortgagor" is defined by s. 1 of the Act to include "any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage." It therefore follows that the original mortgagor or a subsequent mortgagee or purchaser of the equity of redemption, or any other person who is entitled to redeem the mortgage, may avail himself of the provisions of this section when the time for redemption has arrived (b).

Where the owner of an equity of redemption pays off a mortgage and takes an assignment of the mortgage, and

(a) 20 Chy. D. 724.

(b) See *Teevan v. Smith*, 20 Chy. D. 724.

the documents or circumstances show an intention to keep the security alive, it is not extinguished, but enures for the benefit of the owner of the equity of redemption (c).

It is settled by *Teevan v. Smith* (d), that if there are first and subsequent mortgagees of the same estate, the mortgagor, upon redeeming the first mortgage, cannot require the first mortgagee to assign the debt and property to a nominee of his own; although it would seem that he can require such an assignment if he procures the consent thereto of the puisne mortgagee. This rule of *Teevan v. Smith* applies not only (as in that case) where there are several mortgages made by the same mortgagor to several mortgagees, but also where there are several mortgages made by the same mortgagor to the same mortgagee (e). This rule of *Teevan v. Smith*, however, applies only where the several mortgages were made by the same mortgagor, and not to the case where the subsequent mortgages were made, not by the original mortgagor, but by a purchaser of the equity of redemption deriving title under him, even though the several mortgages be made to the same mortgagee; and therefore, in the lastly mentioned case, the mortgagor who pays off the first mortgage may call for an assignment thereof, for the purpose of keeping it alive as a charge on the land, and maintaining its priority over the subsequent mortgage created by the purchaser (f).

The mortgagor who pays the mortgage is entitled to an assignment under the Act when he has redeemed the mortgage after the equity of redemption has been conveyed by him to purchasers or others under such circumstances that they thereupon became, as between him and themselves, primarily liable for the payment of the mortgage debt (g). On the other hand, no person who redeems

(c) *Thorne v. Cann*, (1895) A. C. 11.

(d) 20 Chy. D. 724.

(e) *Rogers v. Wilson*, 12 P. R. 322; affirmed on appeal, 12 P. R. 545.

(f) *Kinnaird v. Trollope*, 39 Chy. D. p. 646; *Wheeler v. Brooke*, 26 Ont. R. 96.

(g) *Queen's College v. Claxton*, 25 Ont. R. 282; *Wheeler v. Brooke*, 26 Ont. R. 96.

a mortgage is entitled to call for an assignment thereof, if, as between himself and the other persons interested in the equity of redemption, he was primarily liable to pay the mortgage debt (*h*).

No person redeeming any mortgage is entitled to call for an assignment of the mortgage debt otherwise than under a contract to that effect, or under the provisions of the statute in question. Apart from the Act, and apart from special agreement, the right of a person redeeming a mortgage is to obtain a *reconveyance of the mortgaged estate, and not an assignment of the mortgage debt* (*i*).

The *priority of the right of subsequent incumbrancers to redeem* and thereupon obtain a reconveyance of the mortgaged estate depends upon and follows the priority of the incumbrances (*j*). Where there are *several persons who, as between themselves have equal rights to redeem*, that one who first brings an action or obtains a judgment for redemption, acquires priority for his own incumbrance over the others (*k*).

Where there is a reconveyance made to a person who redeemed a mortgage when he had only a limited interest in the equity of redemption, it should be made to him to hold subject to the rights of redemption of all parties who hold other interests in the equity of redemption (*l*).

Where a mortgage is paid off either in whole or in part by a person having only a limited interest in the equity of redemption, the Court will subrogate such person to the position of the mortgagee so as to enable him to recover the moneys so paid as against those persons whose equity to resist payment is inferior to his equity to enforce payment (*m*).

(*h*) *Muttlebury v. Taylor*, 22 Ont. R. 312; *Thompson v. Warwick*, 21 App. R. 637.

(*i*) *Gooderham v. Traders Bank*, 16 Ont. R. at p. 441.

(*j*) *Teevan v. Smith*, 20 Chy. D. at p. 730.

(*k*) *Flint v. Howard*, (1893) 2 Ch. at p. 60.

(*l*) *Kinnaird v. Trollope*, 39 Chy. D. at p. 615; *Gooderham v. Traders Bank*, 16 Ont. R. at p. 443.

(*m*) *Pitt v. Pitt*, 24 R. R. 15.

Sub-section 2 of said section 2 provides that "this section does not apply in the case of a mortgagee being or having been in possession."

Where a mortgagor redeems the mortgage under such circumstances that he would otherwise be entitled under the Act to an assignment of the mortgage, but, by reason of the mortgagee being in possession he is not entitled to such assignment, he will be entitled to a *reconveyance of the mortgaged estate for the purpose of enabling him to maintain a charge upon that estate for the moneys paid by him*, and such reconveyance must be made subject to the rights of redemption of all other persons who hold other interests in the equity of redemption (n).

A mortgagee upon being paid off by the mortgagor, is not bound to reconvey the mortgaged estate to the mortgagor or his nominee if the mortgagee has notice of an equitable claim *on the mortgaged estate* by another person whose equitable claim was created and is primarily payable by the mortgagor; that is, where there are several mortgages, liens or charges created by the same person, and which he is primarily liable to pay, that person, although entitled to redeem the first mortgage, is not entitled to thereupon call for a reconveyance of the mortgaged estate from the first mortgagee (o).

It is only where the party paying is entitled, apart from the Act, to call for a reconveyance, that he can under the Act call for an assignment of the mortgage debt (p).

The Act provides that the mortgagee is to make the assignment "*on the terms on which he would be bound to reconvey*," and this phrase refers not merely to the amount of the principal, interest and costs, but also to the terms generally (q).

A. H. MARSH.

(n) *Stark v. Reid*, 26 Ont. R. 257.

(o) See *Teevan v. Smith*, 20 Chy. D. at pp. 730 and 731; and *Kinnaird v. Trollope*, 39 Chy. D. 636.

(p) *Teevan v. Smith*, 20 Chy. D. 724.

(q) *Alderson v. Elgey*, 20 Chy. D. at p. 573.

## SPECIFIC DENIAL IN PLEADING.

(ADKINS v. NORTH METROPOLITAN TRAM CO., 63 L. J. Q. B. 861.)

The most striking difference between the English and Ontario rules of pleading lies in this: under the English rules every allegation not specifically denied is deemed to be admitted ; while in Ontario the silence of a pleading as to any allegation contained in the previous pleading of the opposite party is not deemed any admission of its truth.

A very stringent series of rules was introduced by the Judicature Acts in England to carry out this principle—specific denial—and to force the pleader to deal with each separate allegation of fact in the previous pleading of his opponent of which he did not admit the truth. If he wished to deny, he was obliged to deny specifically.

A capital summary of, and commentary upon, these rules is given in the introduction to Cunningham and Mattinson's *Precedents of Pleading* ; but it may be convenient to recapitulate these rules here: (1) Every allegation of fact . . . if not denied specifically or by necessary implication, or stated to be not admitted . . . shall be taken to be admitted. (2) It shall not be sufficient . . . to deny generally the grounds alleged by the statement of claim . . . but each party must deal *specifically* with *each* allegation of fact of which he does not admit the truth, except damages. (3) When a party in any pleading denies an allegation of fact in a previous pleading of the opposite party, he must not do so evasively, but answer the point of substance, etc., etc.

Evidently one of the principal objects aimed at by these rules was to force the pleader to analyze the previous pleading of his opponent, and to state clearly and specifically exactly what allegations he denied, and what he admitted. It was no doubt very simple and convenient for the defendant's solicitor to be able to plead

simply, "The defendant denies all the allegations of the statement of claim," or, "The defendant puts the plaintiff to proof"—so simple and convenient, and at the same time so *safe*, that one would naturally have recourse to it on all occasions ; even though if each allegation were dealt with separately, the pleader might find that he could quite safely and properly admit one or more of his opponent's allegations. Clearly such admissions would, in many cases, go far to shorten and simplify the proceedings at trial; and it seems evident that these rules were largely directed to force upon the pleader the consideration of what admissions he could safely make, as well as to prevent evasive pleading, and to enforce specific denials, where any denial is intended.

How strictly these rules were interpreted may be seen from such cases as *Thorp v. Holdsworth* (a), where the defendant denied "that the terms of the arrangement between himself and the plaintiff were definitely agreed upon as alleged," and Jessel, M.R., considered this "evasive," and granted *final judgment* for the plaintiff, as on *admissions*; *Harris v. Gamble* (b), where the statement of defence was, "The defendant puts the plaintiffs to proof of the several allegations contained in the statement of claim," which was held by Fry, J., to be an *admission* of the plaintiff's allegations, and judgment was given accordingly; *Ruttan v. Tregent* (c), where the defence was in effect as in *Harris v. Gamble*, with a similar result.

Without multiplying instances, it may be confidently asserted that all such statements in pleadings as "The defendant denies all the allegations of the statement of claim," or, "The defendant denies that there was any such agreement as alleged," were considered bad pleas, and would either be struck out as "embarrassing," or treated as "admissions."

In the Territories, where (wisely or unwisely) the English rules of pleading have been adopted, this inter-

(a) 3 Ch. D. 637.

(b) 7 Ch. D. 877.

(c) 12 Ch. D. 738.

pretation of the rules has been closely followed. It appears, however, that in recent years a practice has grown up in England of pleading such defences as the following: "The defendant denies *each* and *every* allegation in the *2nd paragraph* of the statement of claim. The defendant denies *each* and *every* allegation in the *3rd paragraph* of the statement of claim," and that such denials are held to be neither general nor evasive, but "*specific*."

It appears to the writer impossible to reconcile this view with the interpretation put on the rules by the earlier decisions, and that such defences are open to all the objections that were supposed to attach to the plea of the general issue.

Take the case of *Adkins v. North Metropolitan Trams Company (d)*.

The plaintiff had brought an action against the defendant company for personal injuries and for damage to a pony and van through the alleged negligence of the defendant company. The material facts of the statement of claim were set out in paragraphs 2 and 3. "2. On or about the 10th of April, 1893, the plaintiff's van, while being reasonably and properly driven by the plaintiff along the Commercial Road, Whitechapel, was broken down in consequence of the defective and dangerous state of the defendant's tramway and rails, and the portion of the road on which the tramway is laid. 3. The plaintiff has, in consequence, suffered damage from personal injuries to himself and damages to the pony and van and effects by the breach of duty and default of the defendants, or their servants or agents, in neglecting to make and maintain and keep in good condition and repair the said tramway and rails, and the portion of the road on which the tramway is laid."

The statement of defence simply ran as follows: "The defendants deny each and all the several statements and allegations set out in paragraph 2 of the statement of claim," and gave a denial in precisely similar terms to paragraph 3.

(d) 63 L. J. Q. B. 361.

Hawkins, J. (Lawrance, J., concurring), in a somewhat unsatisfactory and invertebrate judgment, in effect, holds that these are good and sufficient pleas. He says, "But I should have thought that when a man says, 'I deny each and every allegation that constitutes a cause of action in your statement of claim,' that is equivalent to a denial specifically given and drawn out at length to each of such allegations."

Just so—it may be "equivalent," but is it precisely the same thing? Is it what the rules require? Is it anything more than pleading the general issue—*non assumpsit, non indebitatus, not guilty*? It would appear simply "equivalent" to saying, "I put the plaintiff to proof."

Hawkins, J., says, "This is a long way off the old plea of the general issue, which no one alleges to be now sustainable."

Is it? It is different in language, perhaps, but in spirit and effect, is it not exactly the same?

In *Thorp v. Holdsworth*, suppose the defendant instead of denying "that the terms of the arrangement . . . had been definitely agreed upon as alleged," which was held an evasive denial, had simply pleaded a denial of each and every allegation in paragraph (so and so) of the statement of claim, would the denial be any less evasive, or any more specific?

Or, to reverse the process, if the defendant in *Adkins v. North Metropolitan Trams Company* had pleaded that he denied "That on or about the 10th April, 1893, the plaintiff's van, while being reasonably and properly driven by the plaintiff along the Commercial Road, Whitechapel, was broken down in consequence of the broken and defective and dangerous state of the defendant's tramway and rails, and the portion of the road on which the tramway is laid," can any one doubt that such a plea would be struck out as "evasive"—as avoiding the point of substance? If so, how is the position improved by denying "each and all the several statements and allegations set out in paragraph 2," etc.?

It seems inconceivable that the defendants might not safely have admitted (1) the occurrence of the accident,



(2) the date, (3) the place, and (4) that they owned and operated the tramway in question (if this was the fact—otherwise distinctly denying it), and have contented themselves with denying *the point of substance*, viz.: the defects in the tramway, etc., and that the accident occurred in consequence thereof. The plea is in effect the general issue. As long as it remains on the record it is practically a denial (1) that the plaintiff owned the van, (2) that the van was broken down, (3) that the van was properly driven, (4) that it was broken down on or about the date given, (5) that it was broken down at the place mentioned, (6) that the defendants owned a tramway, etc., (7) that the tramway was defective or dangerous, (8) that it was in consequence thereof that the injury occurred.

If it had really been intended to deny each and all of these facts, *specific* denials of each allegation of which the defendant did not admit the truth would have run something as follows: "The defendant denies that the plaintiff owned the van in question. If the plaintiff did own the van, the defendant denies that it was broken down on the 10th April, 1893, or at all, on the Commercial Road or elsewhere. The defendant denies that the plaintiff's van was reasonably or properly driven by the plaintiff (or any one else) on the occasion mentioned. The defendants deny that they own or operate any tramway whatever. The defendants deny that the said tramway and rails (or either of them) were dangerous or defective ; or if they were, that it was by reason thereof that the said van was broken down."

This is not very artistic, perhaps, but roughly it illustrates what is conceived by the writer to be meant by specific denials of *each* allegation of fact not admitted to be true.

That it is cumbersome may be admitted at once ; but it is this very cumbersomeness (which results from breaking up the plea of the general issue into its separate and specific allegations) that forces on the pleader's mind the absurdity of denying anything but the points of substance—and this, the writer respectfully submits, is just what was aimed at by the English rules.

Again, if it is good pleading to say that "the defendant denies each and all the several allegations, etc., in paragraph 2," and then to repeat the same language in respect to paragraph 3, and so on, surely it must be good pleading to say "the defendant denies each and all the several allegations contained in paragraphs 1, 2, 3, 4, 5 . . . of the statement of claim," and if this is good, why not say at once "the defendant denies each and every allegation contained in the statement of claim?"

In the last number of the Occasional Notes will be seen an example of defence (e), framed on the authority of *Adkins v. North Metropolitan Trams Company*, which would certainly seem to be supported by that decision; though in both cases the judgments are unsatisfactory, owing, perhaps, to the judges apparently being led away from the straight issue by the astuteness of the defendants' counsel (in each case) offering to make any reasonable amendment the plaintiff might desire.

The writer does not intend these notes to be considered either an apology for, or eulogium of, the English system of pleading as contrasted with the rules in force in Ontario; he simply wishes to point out that, in his opinion, the logical result of such decisions as *Adkins v. North Metropolitan Trams Company*, is to introduce, to all intents and purposes, all the evils, real or imaginary, of the plea of the "general issue"—and that in an aggravated form—exactly what the rules of pleading, introduced by the Judicature Acts in England, seemed to have been specially framed to avoid.

CALGARY, N.W.T.

C. C. McCAUL.

(e) *Pollinger v. London Guarantee and Accident Co.*, 17 Occ. N. 134. The exact language used by Rouleau, J., is as follows: "With regard to the statement of defence there is no doubt it is not strictly in accordance with the form as required by section 111 of the Judicature Ordinance, and were it not for the case of *Adkins v. The North Met. Tramways Co.*, 63 L. J. Q. B. D. 361, I would be very much inclined to think that the denial in this defence is too general. However, as in this case it is less a matter of principle than a matter of costs, I will not order the defence to be stricken out, as the defendants' counsel is willing to amend if it is really desired by the plaintiff's counsel, so far as to specify to him every material allegation which they intended to deny by this concise denial. The order, therefore, will be that the statement of defence be amended within four days, if desired by the plaintiff's counsel."

## THE STATUTE OF LIMITATIONS AS A CONVEYANCER.

We discussed this subject at some length some years ago (vol. III. p. 521), and came to the conclusion that such expressions as "parliamentary conveyance," "transfer of the title," and so on, where applied to the operation and effect of the Statute of Limitations, were incorrect, and that the statute had no such effect as assuring the land to a trespasser.

The tests there applied were, first, the application of the general principle of the statute, which (as the present Chief Justice of Canada pointed out in *Gray v. Richford*, 2 S. C. R. at p. 454) is extinctive rather than acquisitive in its operation, or (as explained by Mr. Hayes, 1 Conv. 268), is negative in its effect rather than operating positively as a conveyance; and secondly, the application of the Act to land in settlement, where the trespasser (if the Act operated as a conveyance) would become invested with the various titles or estates of the persons entitled under the settlement, as they were barred.

An entirely novel test, however, was applied in a case reported in the *Times Law Reports*, and, curiously enough, not long afterwards an identical case arose in Ontario. The result of both cases (the Ontario case having been decided independently of the English case) is to completely dispel any such notion as that the effect of the statute is the same as that of a conveyance. In the English case, *Wilkes v. Greenway*, 6 Times L. R. 449, the defendant had acquired a title by possession to two plots of ground completely surrounded on all sides by land of the plaintiff's. Along one side ran a roadway, and the plaintiff sought to restrain the defendant from using the roadway, on the ground that, though he had acquired a title by possession to two plots, the period of user of the road was not long enough to give

him a right of way over it. In the Court of first instance, Vaughan Williams, J., decided against the plaintiff. As the case is not reported elsewhere, we believe, and the judgment is not very long, we give it in extenso: "The real question is, the defendant having acquired a title to the gardens in question, has he a right of way over the plaintiff's private road, or otherwise, that being the only means of approach? Now, the defendant has not acquired any right of way under the Prescription Acts, or by express grant. If, therefore, he has acquired a right, it must be by some implication or presumption of law. It seems clear that the effect of the Statute of Limitations is merely to extinguish the right and remedy of the original or disseised owner, and not to transfer his title to the disseisor, whose title is founded in possession and nothing more. But certain presumptions follow on possession—for example, seisin in fee is presumed from possession unless and until some one with a better unextinguishable title intervenes. In my opinion, this presumption extends to everything which is necessary to the enjoyment of that possession, and without which it could not exist. In theory of law, every man's title has a legal origin—the law does not recognize wrongful titles as such, and, in my opinion, the law must presume that all such rights exist, without which the right recognized by the law could not exist. It would be wholly inconsistent with public policy and public interest that while the title of the disseised owner is extinguished, yet no one should be in a position to enjoy the property. It is on this principle that the doctrine of way of necessity was invented—a way of necessity is of course an undefined way; but I see no reason why, where a defined way is absolutely necessary to the enjoyment of the property, the law should not presume that somehow or other by legal means, by grant or otherwise, that right of approach must have been created without which that possession could not have been taken and that seisin enjoyed which the law recognizes."

It is remarkable that, while the learned Judge especially refers to the extinctive operation of the statute as its only one, he immediately proceeds to add to the loss of the landowner, by presuming that the law must have intended a positive operation in addition to the negative one. While the statute is silent as to positive operation, the learned Judge not only makes it speak positively as to the very land affected, but gratuitously adds to the landowner's loss by providing a right of way for the trespasser over another piece of the owner's land.

This judgment was reversed on appeal, and it is here that we find the principle of extinctive operation adhered to. Lord Esher, M.R., said, "The statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot import into such negative provisions doctrines of implication that would naturally arise where title is created by express grant or by statutory enactment. The title to the premises is not a title by grant. The doctrine of a way of necessity is only applied to a title by grant, personal or parliamentary."

To the same effect is *McLaren v. Strachan*, 3 Ont. R. at p. 120, note. The facts were almost identical. Title by possession had been acquired by enclosing and occupying a space in the midst of the plaintiff's land. In addition, though a way was not claimed, the period of user of the way not being long enough to entitle the defendant to claim it under the prescription clauses of the Limitations Act, the Chancellor expresses his opinion upon the question. "In other words," said Boyd, C., "the possession of the lands enclosed—barring the buildings—was in the plaintiff, and she [the defendant] has no right to a foot or an inch outside the house and shed. . . . No question arises on this record as to her having any right of way to get to the house. At present my opinion is that she has no right, as she has not had sufficient length of enjoyment to gain an easement; and a way of necessity which would arise by implication

upon a purchase should not be attached by construction of law to a squatter's appropriation of another's property, though it may be dignified by the name of parliamentary conveyance." His Lordship then referred to *Wilkes v. Greenway*, which he was referred to after writing his judgment.

These authoritative expressions of opinion upon cases, the facts of which were peculiarly adapted to raising the point, should settle the question about parliamentary conveyancing.

This statute is perhaps the last one in which we might expect to find any humorous situation. But what could be more humorous than the position of a trespasser who may stay in his land-locked parcel or may stay out, but who is not free to go to and fro? If he is caught in his retreat he may be enjoined from coming out. If he is caught out of it, he may be enjoined from going in. But if he should meet with the latter fortune, and the landowner should take possession of the trespasser's plot, the latter, although he could not go in to defend his possession, could enjoin the landowner from committing trespass on his land-locked parcel. There would be plenty of work for lawyers, but no material enjoyment of the land.

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## EDITORIAL REVIEW.

**A Curious Court.**

In the early days of the Colony of Newfoundland, a very curious Court was created for the purpose of regulating and determining the rights and disputes of the fishermen and inhabitants. By the Act 10 & 11 Wm. III. c. 25, s. 1, it was enacted "That (according to the ancient custom there used) every such fishing ship from England, Wales or Berwick, or such fisherman as shall, from and after the said twenty-fifth day of March, first enter any harbour or creek in Newfoundland in behalf of his ship, shall be admiral of the said harbour or creek during the fishing season . . . and that the master of every such second fishing ship as shall enter any such harbour or creek shall be vice-admiral of such harbour or creek during that fishing season; and that the master of every such fishing ship next coming as shall enter any such harbour or creek shall be rear-admiral of such harbour or creek during that fishing season." As a reward of first entry, the master of the first vessel was entitled to enough of the beach for his boats, and for one boat more than he actually had, while others were entitled only to the necessary proportion of beach for the actual number of their boats. If any dispute arose as to apportioning the beach, the admirals, or any two of them, were to apportion the beach according to the number of boats of each ship.

The judicial functions of the admirals, however, did not end here. By s. 14 of the Act, it was enacted, "That the admirals of and in every port and harbour in Newfoundland, for the time being, be and are hereby authorized and required (in order to preserve peace and good government amongst the seamen and fishermen, as well in their respective harbours as on the shore) to see the rules and orders in this present Act contained, concerning the regulation of the fishery there, duly put in

execution ; and that each of the said admirals do yearly keep a journal of the number of all ships, boats, stages, and train-fats, and of all the seamen belonging to and employed in each of their respective harbours, and shall also (at their return to England) deliver a true copy thereof under their hands to His Majesty's Most Honourable Privy Council."

And by s. 15, it was further enacted, "That in case any difference or controversy shall arise in Newfoundland or the islands thereunto adjoining, between the masters of fishing ships and the inhabitants there, or any by-boat keeper, for or concerning the right and property of fishing rooms, stores, flakes, or any other building or conveniency for fishing or curing of fish, in the several harbours or coves, the said differences, disputes and controversies shall be judged and determined by the fishing admirals in the several harbours and coves; and in case any of the said masters of fishing ships, by-boat keepers, or inhabitants shall think themselves aggrieved by such judgment or determination, and shall appeal to the commanders of any of His Majesty's ships of war appointed as convoys for Newfoundland, the said commander is hereby authorized and empowered to determine the same pursuant to the regulation in this Act."

This jurisdiction was exercised for a long time, and, as might be expected, gave way with difficulty before a more regular system.

#### **Forfeiture of Lease—Notice.**

The question of the sufficiency of a notice of intention to forfeit a lease, which is required to be given under the Landlord and Tenant Act in certain cases, has arisen in England in an action for not repairing ; and the technical character of the required notice has been maintained which in other cases has been laid down for it.

In this Province, in the only case in which the matter has apparently arisen, rather the opposite view has been taken. In *McMullen v. Vannatto*, 24 Ont. R. 625,



the plaintiff (landlord) gave the following notice: "I hereby give you notice that you have broken the covenants as to cutting timber on the premises, being [describing them], which you hold of me under a lease bearing date . . . and made between myself as lessor, of the first part, and you as lessee, of the second part, containing such covenants, and I require you to pay me forthwith, or within a reasonable time after service of this notice on you, fifty dollars as compensation for such breach of covenant." During the argument as to the sufficiency of the notice the Chancellor said, "But surely there might be a difference between a notice given by a farmer and a skilled draftsman." We should respectfully say, "No." A notice must fulfil the requirements of the statute, and its sufficiency depends upon whether it complies with the statute, and not upon the notion of the person giving it as to what it ought to contain. The notice must specify the particular breach, so that the tenant may repair it and save an action.

In his judgment the Chancellor further said, "The defendant does not pretend he was misled by the notice, or that he did not know the special grievance between them, but pleads that the cutting in question was done by express arrangement with the landlord that a particular place should be cleared, and in this the jury have given against the tenant. I think the notice is sufficient, being intelligible and precise as between man and man—though perhaps not up to the rules observed in the Courts for particulars in pleading. These notices are intended to be given by laymen, and where no misconception appears, the Court should not be asked, at the end of litigation adverse to the tenant, to help him in an unmeritorious criticism that the notice was not specific."

The tenant may really be all at sea with regard to what will satisfy the landlord. And the fact that he happens to know without a notice what is wanted, does not avail the landlord, for if it did, he could always proceed without notice in the teeth of the statute, by proving that the tenant knew of the breach.

Such a thing as a layman giving the notice was probably never contemplated, any more than was a landlord's bringing his own action. He consults a solicitor, asks his services to eject his tenant, and is immediately furnished with a notice to serve upon him, which should be as specific in its terms as if he were delivering particulars in an action for damages, for breach of the covenant. It is no protection to the tenant if not specific.

In *Fletcher v. Nokes*, L. R. (1897) 1 Ch. 271, a very similar notice was given. "I hereby give you notice that you have broken the covenants for repairing the inside and outside of the houses . . . contained in a lease. . . . And I require you to repair the said houses in accordance with the said covenants forthwith, and to pay forthwith to me £20 as compensation for such breach of covenant." This notice was held to be insufficient. North, J., said, "There is nothing in it to indicate in which of the houses the default has been made, or whether it has been made in all of them. The main ground of my conclusion that the notice is insufficient is this: Suppose that s. 14 had not been passed, and the previous law had remained in operation, and the landlord had brought an action against the tenant for breach of covenant, the first thing which the landlord would have been compelled to do would have been to give particulars of the breaches on which he relied in order that the tenant might know what he had to meet. I think that s. 14 was intended to place the tenant in a better position than he was before. He was to have the option of doing, before action brought, all those things the neglect of which would have been the ground of relief against him if s. 14 had not been passed. It is impossible to suppose that the tenant was intended to be before action in a worse position, with respect to alleged breaches, than he would formerly have been in an action. I think the notice which is to be given under s. 14 ought to be such a notice as will enable the tenant to understand with reasonable certainty what it is which he is required to do. . . . Section 14 says that it is to be a notice 'specifying the particular breach' complained of.' I do not think that is met by a notice which

simply says, 'You have broken the covenants for repairing.'"

It will be observed that while the Chancellor distinctly states it as his opinion that a notice need not be as precise as in giving particulars in an action, that is the very test laid down by Mr. Justice North. The tenant is not to be worse off.

### **Law Reform.**

Once the constitution of the Courts is disturbed by a so-called reform, it becomes apparently necessary to reform the reforms. The result of the late Law Courts Act was to throw the whole appellate business into the Court of Appeal, clog the Court, and leave it largely in arrear; so hopelessly in arrear that it could not possibly do the work. Before that Act was passed everything was working smoothly. The cases underwent a sifting which left a very small proportion of cases to go to the Court of Appeal. Not only were the unimportant cases sifted out, but those cases which went to the Court of Appeal received a sifting which necessarily cleared up and accentuated the issues raised. This latter point should not be overlooked in any appellate system. It was sagely said that there were too many appeals in each case, not too many cases appealed. That sounds wise, but is it? Every lawyer knows that the more a case is discussed the narrower the discussion becomes, the more clear are the points for decision, and the more satisfactory the decision. Under the present system the appealed case does not receive the same satisfactory treatment that it did before; the Court of Appeal is clogged with work, and in consequence litigants appeal for no other reason than to gain time; the Court of Appeal, in exercise of its powers, requests a Divisional Court to sit, and that Court, though as a Divisional Court it would have to take its law from the Court of Appeal proper, can, as a Court of Appeal, give the law to the higher Courts. All this is most unsatisfactory. The vice is in the so-called reform which

produced this result. The only real remedy is to reinstate the old system. Instead of doing this, however, the Attorney-General has introduced a bill to add one Judge to the Court of Appeal. Then the Court or Lieutenant-Governor in Council may call in High Court Judges to enable the Court to sit in two divisions. We reserve comment on the bill, as it may be modified, or may not pass. One peculiarity is worth noting, however. Four Judges shall constitute a quorum, but all appeals, except election appeals, may be disposed of by not less than three Judges. In the absence of an interpretation clause it would be difficult to define what is meant by a quorum. There is also the very extraordinary enactment that one or two Judges chosen from the High Court to sit in the Court of Appeal shall have all the power and authority of a Court of Appeal composed of three Judges of the Court of Appeal. The bill certainly cannot be commended for its drafting.

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## BOOK REVIEWS.

*Tariffs of Costs* under the Judicature Act, with Index to Tariff "A." Practical Directions and Precedents of Bills of Costs. By J. A. McANDREW, one of the Taxing Officers of the Supreme Court of Judicature for Ontario. Toronto: Goodwin & Co. 1897.

Making up a good bill of costs, by which 'is meant not inordinately expanding it, but rendering it impervious to the onslaught of the taxing officer, is decidedly an art. If one cannot acquire it by practice, he can at best follow a precedent. And when the precedent is set by one of the taxing officers, one feels safe in following it. Mr. McAndrew's experience in the taxing office has enabled him to furnish us with no less than fifty-one precedents of bills for various actions and phases of actions, so that one need hardly be at a loss for a guide. Some practical directions, which are all too meagre, form a part of the work. We can strongly recommend the book.

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*General Digest, American and English.* Quarterly advance sheets. All current case law of the United States, with English and Canadian cases, with references here to first publications of the opinions; later, in permanent volumes, references are made to all publications, official and unofficial. Number one, to October, 1896. Number two, to January, 1897. Rochester: Lawyers' Co-operative Publishing Co. 1897.

This Digest, which comes pretty promptly to hand after the expiry of the quarter which it covers, is the most concise and complete of its kind. It covers almost an infinity of matter, if one may use such an expression, is well arranged, and handy in form. Each quarter the whole range of latest authorities is covered by reference to the place where the judgment, or note

of it, first appears, and when the permanent volume appears it will refer to the official report as well as to voluntary or unofficial reports.

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*The Historical Development of Code Pleading in America and England. With special reference to the Codes of New York, etc. By CHARLES M. HEPBURN, of the Cincinnati Bar. Cincinnati: W. H. Anderson & Co. 1897.*

No really good pleader can, even at the present day, dispense with some knowledge of the previous systems of pleading. Under the common law system an exceedingly accurate knowledge of law was required for special pleading. Under the present system, no knowledge of law is required at all ; for there is no demurrer, and the parties can always amend even (in practice, if not in theory) to the extent of raising a new cause of action. The result is not merely to foster carelessness in pleading, but to produce carelessness in acquiring a knowledge of law. For if it is not required that a pleader should be accurate in pleading, he will incline to become inaccurate in his knowledge of law. Anything therefore which would encourage the study of pleading is welcome. Mr. Hepburn's work covers not only those systems which work on a code of procedure, but all those which, without a code, have yet departed from the common law pleading, and require pleadings to follow modern statutory rules. A complete history of the causes which led to the adoption of statutory rules, the modification of these rules, and the present mode as compared with the old, is given. We would have been pleased to have had included in the scope of the work some short practical treatise on pleading, but the work is strictly historical in its scope.

## HAMILTON LAW ASSOCIATION REPORT FOR 1896.

The number of members at the date of the last report was 71; two left the county and two have been added during the year. The present membership is 71. The annual fees to the amount of \$342.50 have been paid. The number of bound volumes in the library is 3,021, of which 185 have been added during the past year. The following periodicals are received, namely: The Law Times, The Times Law Reports, The Law Journal Reports, The Solicitors' Journal, The Albany Law Journal, The Canada Law Journal, The Canadian Law Times, The Western Law Times, The Green Bag, The Law Quarterly Review.

The treasurer's report is submitted herewith, giving a detailed statement of receipts and expenditures in the form required by the Law Society; all the liabilities of the association have been paid except the loan due to the Law Society; the balance yet to be paid amounts to \$300.

A large group photograph of the members of the association was presented to the association, and the same is placed in the library.

During the year the trustees have endeavoured to obtain the statutes of the different provinces of the Dominion. The statutes of several of the provinces have been received, and the others have been promised and are expected in a short time.

The Ontario Legislature has appointed a committee to revise the rules of the Judicature Act. Rules came into effect on the 1st of January, 1896, and the trustees hope that before the new rules are brought into force they may be submitted for a reasonable time to the different law associations for any suggestions they may desire to make in reference thereto.

The County Council has supplied the association with an additional room in the basement of the court house for keeping such books as are not in daily use by the members.

The trustees have endeavoured during the past year to complete the sets of all reports which were not complete, and have succeeded in completing a number of them. It is advisable to continue this, and also to endeavour to complete as far as possible the set of statutes of Upper Canada. During the past year the Inspector of County Libraries inspected the library of this association. His report has been printed and distributed. In his report he suggests, among other things, that the auditors annually check over the books in the library with the inventory prepared by the librarian. This is already provided for by Rule 34 of the association.

The association is desirous of continuing to press upon the proper authorities the amendment of the Devolution of Estates Act, so as to allow the sale of lands with the approval of the Judge of the Surrogate Court or Local Master without requiring the intervention of the official guardian.

The trustees, while recognizing the assistance rendered by the Ontario Government in the past, would recommend that a change be made in the basis of distribution by fixing a minimum amount of not less than a certain sum for each member in good standing.

Dated 31st December, 1896.

EDWARD MARTIN,  
*President.*

THOMAS HOBSON,  
*Secretary.*



# THE CANADIAN LAW TIMES.

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MAY, 1897.

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## RESTRAINTS ON ALIENATION.

I PURPOSE writing a supplement to two articles which appeared in these columns last year (*a*), one of which collects authorities upon the above subject, and the other of which deals with the same subject from the standpoint of the Roman Law.

The Courts of this Province have followed the doctrine of *Re Macleay* (*b*), which is now repudiated in England, and have so tied their own hands with reference to the matter that a complete reconsideration of the subject by an appellate Court is necessary in order to put the matter upon a satisfactory basis, so that both those who advise and those who are advised concerning titles may know whether our law is to follow the English law upon its main line, or is to follow it upon one of its former side-tracks which has now fallen into disuse.

The doctrine as now applied in this Province can scarcely be said to have been asserted and applied for so long a time that it has become a rule of property law, and will, whether well founded or otherwise, be held to be the law of the land, because *communis error facit jus*.

The opinions of Judges in this Province have not been entirely uniform (*c*), but it must be admitted that

(*a*) 16 C. L. T. 1, 101.

(*b*) L. R. 20 Eq. 186.

(*c*) See *per Moss, C.J.*, in *Armstrong v. McAlpine*, 4 App. R. at p. 254; *per Proudfoot, V.C.*, in *Crawford v. Lundy*, 23 Gr. at p. 250; *per MacMahon, J.*, in *Heddlestone v. Heddlestone*, 15 Ont. R. 280; and *per Falconbridge, J.*, in *Re Shanacy & Quinlan*, 28 Ont. R. 372.

the current of authority has decidedly set in one direction.

The number of reported cases upon the subject in this Province is so great as to naturally raise the query why this is so; and possibly the answer is to be found in the fact that so large a proportion of the conveyancing done in the Province is the handiwork of the hedge school-master, and of those trained by him. The following are the cases:—

1850—Doe d. McIntyre v. McIntyre, 7 U. C. R. 156; a restriction upon what was *prima facie* a fee was held to convert it into an estate tail.

1857—Gallinger v. Farlinger, 6 C. P. 512; restraint held void.

1862—Barker v. Davis, 12 C. P. 344; absolute bequest with provision that it was to go over if attacked by creditors; restriction held void.

1862—Bergin v. Sisters of St. Joseph, 22 U. C. R. 204; restraint held void.

1868—Pennyman v. McGrogan, 18 C. P. 132; restriction held valid.

1876—Crawford v. Lundy, 23 Gr. 244, 250; restriction held valid because it applied to the trustees only and not to the c. q. t. It would have been invalid had it applied to the c. q. t.

1876—Fulton v. Fulton, 24 Gr. 422; restraint held void.

1879—Armstrong v. McAlpine, 4 App. R. 250; restrictive clause discussed, but question of validity not determined.

1881—Lario v. Walker, 28 Gr. 216; restraint on alienation contained in a deed of grant held void for repugnancy.

1881—Earls v. McAlpine, 6 App. R. 145; same restrictive clause which was in question in Armstrong v. McAlpine held valid by a differently constituted Court.

1881—Smith v. Faught, 45 U. C. R. 484, 488; restraint held valid.

1883—*Dickson v. Dickson*, 6 Ont. R. 278; restraint held valid.

1883—*Re Casner*, 6 Ont. R. 282; restraint held void.

1884—*Re Winstanley*, 6 Ont. R. 315; restraint held valid.

1887—*Re Watson & Woods*, 14 Ont. R. 48; restraint held void.

1888—*Heddlestone v. Heddlestone*, 15 Ont. R. 280; restraint held void.

1888—*Re Colliton & Landergan*, 15 Ont. R. 471; restraint held void as repugnant to an estate tail.

1888—*Re Weller*, 16 Ont. R. 318; restraint held valid.

1889—*O'Sullivan v. Phelan*, 17 Ont. R. 730; restraint held valid.

1889—*Re Northcote*, 18 Ont. R. 107; restraint held valid.

1890—*Meyers v. Hamilton Provident Co.*, 19 Ont. R. 358; restraint held valid.

1897—*Chisholm v. The London & Western Trusts Co.*, 28 Ont. R. 349; restraint held valid.

1897—*Re Shanacy & Quinlan*, 28 Ont. R. 372; restraint held void, the restraint being that none of the devisees should either sell or mortgage the land.

It is perhaps unwise for a lawyer in this Province to admit that there is any branch of the law so administered as to raise the suggestion that it is not the perfection of wisdom, for to make such an admission is to open the door and invite the entrance of that "bull in a china shop," the heaven-born law reformer, who, unwilling to let the law right itself by a natural process of evolution in the Courts, is ever ready to rush in where the wisest fear to tread, and administer some legislative nostrum which is warranted to kill or cure in every case.

I may, however, justify my course in the present case by the reflection that the heaven-born law reformer usually belongs to a class that would pass over, without reading, any article written under a heading which savours of dry law.

The governing case in this Province is *Earls v. McAlpine* (d), where a testator devised lands to his son in fee, with a direction that he "do not sell or transfer the said property without the written consent of my said wife during her life." The devisee mortgaged the property without the consent of his mother, and it was held by the Court of Appeal that this mortgage operated to forfeit the estate taken by the devisee, which estate thereupon devolved upon the heirs of the testator, and that the only interest acquired by the mortgagee was that which passed by virtue of the mortgagor being one of the heirs and thereby acquiring a share in the property. *This was decided notwithstanding that the Court did not find it necessary to determine whether the making of the mortgage was a breach of the condition not to sell or transfer.*

Probably the most extreme case in our Courts is *Re Winstanley* (e), in which the Court purported to follow the rule laid down by Sir George Jessel, M.R., in *Re Macleay* (f), that a restraint upon alienation will be valid so long as it does not *substantially* take away all power of alienation, and that it is a question of substance, and not mere form, and accordingly they held that a condition imposed upon a devisee in fee that she "shall not dispose of the same only by will and testament" was a valid condition.

Almost the only ameliorating feature of the law upon this subject, as at present administered in this Province, is connected with the fact that such restraints upon alienation are subject to the Rule against Perpetuities, which renders completely void *ab initio* any such restraint if it purports to be operative for a period exceeding some specified life or lives in being plus an added term of twenty-one years; or, in the event of no term of years being referred to, if it purports to be operative for a period exceeding such specified life or lives.

(d) 6 App. R. 145.

(e) 6 Ont. R. 315; but see *contra* *Re Shanacy & Quinlan*, 28 Ont. R. 372.

(f) L. R. 20 Eq. 186.

In the cases which commonly occur in actual practice, the restraint will usually be obnoxious to the rule unless the restraint shows upon its face that its operation is to be restricted in time to the life of the first devisee in fee, or to the life of some other existing and specified person (g).

O'Sullivan v. Phelan (h) is a case in which the restraint on alienation imposed upon devisees would on its face appear to be obnoxious to the Rule against Perpetuities, and therefore void, although the Court held the restraint to be valid, without making any reference to this point, notwithstanding that it was relied upon by counsel in argument. The testator in that case had devised land to his two nephews with the following provision: "But neither of my said nephews is to be at liberty to sell his half of the said property to any one except to persons of the name of O'Sullivan in my own family; *this condition is to attach to every purchaser of the said property.*"

It may be that under the state of facts which existed at the death of the testator the said restraint was deemed not to be obnoxious to the Rule against Perpetuities, if the said restraint was so construed as to confine its operation to a purchaser who buys directly from one of the devisees, and therefore to prevent it from applying to a subsequent purchaser deriving title under such first purchaser; for the Court will, for the purpose of ascertaining whether there has been an infringement upon the Rule against Perpetuities, look to the state of facts existing at the time of the testator's death, and treat the will as speaking from that date, and then determine whether, upon that state of facts, the provisions of the will, if carried into effect, could by possibility result in an infringement upon the rule; if they could so result the

(g) As showing that the Rule against Perpetuities applies to such restrictions, see *Re Macleay*, L. R. 20 Eq. 186, 187, 198, 190; *Dunn v. Flood*, 25 Chy. D. 629; *per James, L.J.*, in *Cooper v. Macdonald*, 26 W. R. at p. 379; *Willis v. Hiscox*, 4 Myl. & Cr. at pp. 201-2; *Re Winstanley*, 6 Ont. R. at p. 320. As to the application generally of the Rule against Perpetuities, see 10 C. L. T. 241-265.

(h) 17 Ont. R. 730.

said provisions will be avoided: if, on the other hand, the carrying out of the provisions of the will could not possibly lead to such a result, the said provisions will not be obnoxious to the rule (i).

*The Right of Alienation is an Incident of Ownership.*—It is a general rule of law that a right to alienate property is an incident which necessarily attaches to the ownership of such property. The rule applies in all cases where the ownership is an absolute ownership, such as is derived under a conveyance in fee simple, or such as is derived under a conveyance of a life estate, or an estate for years, or any other estate of a limited nature, that is, any estate less than the fee simple; for there may be an absolute ownership of a limited interest; on the other hand, the interest may be fixed and determined—though of a limited character—while the ownership thereof may be contingent or subject to defeasance; thus a man may be the absolute owner of an estate for life, or he may on the other hand be the owner of an estate for life subject to defeasance, or he may have a right therein which upon the happening of some contingent event will ripen into ownership.

If a man be the absolute owner of any estate in property, it necessarily follows that he has the power to alienate that estate; if on the other hand lands be conveyed to a man, his heirs and assigns forever, subject to a valid condition restricting his right to alienate the same, the grantee acquires something less than an estate in fee

(i) See *Southern v. Wollaston*, 16 Beav. 276, and *Re Dawson*, 39 Chy. D. 155. It would appear, however, that the *O'Sullivan* case cannot be explained upon this ground, for, although it was stated that one Jeremiah O'Sullivan was the only person living at the death of the testator to whom the land could under the terms of the will be sold, yet it was possible that Jeremiah O'Sullivan might have children born after the death of the testator, who might under the terms of the will purchase the property, and who would thereupon as such purchasers become in terms subject to the restraint which the will purported to impose upon purchasers; such a restraint upon persons unborn at the death of the testator would infringe upon the rule; and because such an infringement was possible the restraint imposed by the will was wholly void. A condition and forfeiture clause will be read along with the gift over for the purpose of determining whether the provision is an infringement upon the Rule against Perpetuities: *Hodgson v. Halford*, 11 Chy. D. 959.

simple (which is the largest estate in land known to our law), for he is deprived of one of the necessary incidents of that estate. The same remark applies where an estate is conveyed to a man for life subject to some condition, the breach of which will defeat the life estate; that man takes something less than a life estate; although it is common in the one case to speak of the estate as an estate in fee, and in the other case to speak of it as an estate for life.

There are certain estates well known to the law, e.g., an estate in fee, an estate tail, a life estate, a term of years, a tenancy from year to year, a tenancy at will, a tenancy at sufferance; and there are other "fancy estates" which testators and others are constantly endeavouring to create in order to gratify their own whims; our present object is to ascertain the limit to which the law will allow them to go in creating "fancy estates."

Where a testatrix directed a Government annuity to be purchased for an annuitant, and declared that the annuitant should not "be allowed to accept the value of the annuity in lieu thereof," it was held that this declaration was ineffectual, and that the annuitant was entitled to receive the purchase money instead of the annuity, because of the ownership therein which became vested in the beneficiary, and because of the property rights which attached to that ownership (j).

The only exception to the general rule that the right of alienation is an incident of ownership is the Restraint upon Anticipation which may be imposed upon an estate that has been settled upon a married woman for her own separate use (k).

*Estate Unknown to the Law.*—"A testator will not be allowed to create a new kind of estate unknown to the law" (l). Thus, where a testator devised a planta-

(j) *Stokes v. Cheek*, 28 Beav. 620.

(k) See *Corbett v. Corbett*, 14 P. D. at p. 11, and *Stogdon v. Lee*, (1891) 1 Q. B. 661.

(l) *Re Elliott, Kelly v. Elliott*, (1896) 2 Ch. at p. 856.

tion to A., with the provision, "On any sale by the plaintiff of the said plantation I will and direct her to pay to my brother the sum of £1,000 out of the proceeds of such sale;" it was held that this imposed no obligation to sell, and that the direction was repugnant and void, and that the property therefore belonged to A. absolutely (m).

"Incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of any owner" (n).

"Great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands however remote. . . . If one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coal from a particular pit, while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can conceive" (o).

Thus where there was a bequest to two persons equally until they came of age or married, and if either of them died under age or unmarried, then to the survivor, but *if both died leaving no issue, then to go as therein directed*; it was held that the gift vested indefeasibly at twenty-one or marriage (p). So also where a gift was made by will to a son to be paid at twenty-one, with a gift over in the event of his dying under that age *or afterwards without heirs and intestate*; it was held that the son took an absolute interest upon his attaining twenty-one, for "*A testator cannot give property and separate from it the jus disponendi*" (q).

(m) S. C. at p. 353.

(n) *Per* Lord Brougham, in *Keppel v. Bailey*, 2 Myl. & K. at p. 535.

(o) *Ibid.* at p. 536.

(p) *Thackeray v. Hampson*, 25 R. R. 186.

(q) *Cuthbert v. Purrier*, 23 R. R. 104.



The law will not permit personalty to be entailed, and if an attempt be made to entail personal property the person who, in the event of the property being realty, would be the tenant in tail will in such case become the absolute owner (r).

“If a man makes gift in tail on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue shall not be tenant by the curtesy, or that tenant in tail shall not suffer a common recovery, these conditions are repugnant and against law, because by the gift in tail he tacitly enables him to commit waste, that his wife shall be endowed, and to suffer a common recovery. And therefore it is repugnant to restrain it by condition, for that would be to give a power, and to restrain the same power in one and the same deed” (s).

*Repugnancy.*—The reason why property may not be given, granted or devised to a man, subject to the condition that he shall not exercise the rights of ownership with respect thereto, is that such a condition is repugnant to the nature of the estate to which it is attempted to annex it, and is void by reason of such repugnancy. As a general rule we may ascertain whether a given restrictive condition may be attached to a given estate by ascertaining whether the said condition would be repugnant to the nature of the said estate. The examples already given of estates unknown to the law will also serve to illustrate the rule against repugnancy.

A testator devised lands to his son *A. and his heirs*, and then declared that in case his said son should die without leaving lawful issue the estate should go to his son's next heir-at-law; it was held that the contingency of death without issue was not confined to death in the lifetime of the testator, but referred to death at any time; that the gift over could not take effect as an

(r) *Re Lowman*, (1895) 2 Ch. at p. 354.

(s) *Sir Anthony Mildmay's Case*, 6 Co. 41a.

executory devise, because *if it were valid its only operation would be not to alter the devolution of the estate, but only to fetter the power of alienation during the lifetime of the son*; that therefore the gift over was repugnant and void, and that the devisee took an absolute estate in fee simple (t).

“From the earliest times the Courts have always leant against any device to render an estate inalienable. It is the policy of the law always to make estates alienable, and it is immaterial by what device it is attempted to prevent an owner from exercising the power of ownership. This lies at the foundation of the rule in Shelley’s Case, in which words appearing to convey an independent gift were construed to be words of limitation” (u).

“If a testator, after giving an estate in fee simple to A., were to declare that such estate should not be subject to the bankruptcy laws, that would clearly be inoperative. I apprehend that this is the test. An incident of the estate given which cannot be directly taken away or prevented by the donor, cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person” (v). But the estate given may itself be of such a limited character that it will consistently with its own nature, and by reason of that nature, come to an end or shift over upon the happening of some specified event.

A testatrix gave real and personal estate “Upon trust for my third son J., his heirs and assigns; but if my said son should do, execute, commit, or suffer any act, deed or thing whatsoever, whereby or by reason, or in consequence whereof, or if by operation of law he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime, then, and in such

(t) *Re Parry & Daggs*, 31 Chy. D. 130.

(u) *Per Fry, L.J.*, in *Re Parry & Daggs*, 31 Chy. D. at p. 134.

(v) *Per Kay, J.*, in *Re Dugdale*, 38 Chy. D. at p. 182.

case, the trust hereinbefore contained for the benefit of my said son shall absolutely cease and determine, and the estates and premises hereinbefore limited in trust for him " should be held in trust for his wife, or, if no wife then living, for his children equally. Held that the beneficiary took an absolute interest under the gift, and that the attempted executory gift over was void for repugnancy to the estate in fee which was first devised (*w*).

In the following cases, conditions or directions in the nature of conditions have been held to be void as being repugnant to the nature of the estate to which they were annexed:—

Condition against mortgaging or suffering a fine or recovery, upon breach of which estate was to go over (*x*).

Condition against alienation until after twenty-one years from testator's death (*y*).

Devise and bequest in fee of real and personal property, subject to condition that devisee should not during his life have power to mortgage, sell, alien, charge or encumber (*z*).

Condition "never to *sell* it out of the family, but if sold at all it must be to one of his brothers hereinafter named" (*a*).

Condition that devisee's interest should cease if two named persons (husband and wife), or any of their descendants, should become entitled to any part of the estate by gift, sale, devise, settlement, or other instrument executed by the devisee (*b*).

Condition that if devisee should die under twenty-one, or having attained twenty-one should not have made a will, then property to go over (*c*).

(*w*) *Re Dugdale*, 38 Chy. D. 176.

(*x*) *Ware v. Cann*, 10 B. & C. 433; but see remarks of Boyd, C., on this case in *Re Winstanley*, 6 Ont. R. at pp. 320-1.

(*y*) *Renaud v. Tourangeau*, L. R. 2 P. C. 4.

(*z*) *Corbett v. Corbett*, 14 P. D. 7.

(*a*) *Attwater v. Attwater*, 18 Beav. 330.

(*b*) *Ludlow v. Bunbury*, 35 Beav. 36.

(*c*) *Holmes v. Godson*, 8 DeG. M. & G. 152; and see cases there cited.

Condition that if devisee should die without having disposed of the property by will or otherwise it should go over (*d*).

Devise of lands with direction that the rents should not be raised (*e*).

Devise of lands with a direction that they be kept vacant and unoccupied (*f*).

Direction that devisee shall not sell, alienate or dispose of property devised, except by way of exchange or for re-investing the value in the purchase of other estates (*g*).

Devise to son in fee, with provision that if the son or any one claiming under him should desire to sell during the lifetime of the testator's widow, he should first offer her the option to purchase at one-fifth of the actual value (*h*).

Devise in fee with provision that if devisee should be declared bankrupt the estate should cease and the property go over (*i*).

Condition that if legatees should sell their legacies before the time of payment thereof, then same should be forfeited (*j*).

Bequest with condition that if beneficiary should die without having disposed of the property by will or otherwise it should go over (*k*).

Condition in life assurance policy that it should not be assignable in any case whatever (*l*).

Bequest to son of dividends for life, and at his decease the corpus to go to his heirs, executors, adminis-

(*d*) *Shaw v. Ford*, 7 Chy. D. 673.

(*e*) *Attorney-General v. The Master of Catherine Hall, Cambridge*, 23 R. R. 92.

(*f*) *Brown v. Burdett*, 21 Chy. D. 667.

(*g*) *Hood v. Oglander*, 34 Beav. at p. 522.

(*h*) *Re Rosher*, 26 Chy. D. 801.

(*i*) *Re Machu*, 21 Chy. D. 838.

(*j*) *Powell v. Boggis*, 35 Beav. at pp. 536, 538.

(*k*) *Re Yalden*, 1 DeG. M. & G. 53; and see *Re Wilcock's Estate*, 1 Chy. D. 229.

(*l*) *Re Turcan*, 40 Chy. D. 5.

trators and assigns, with a direction that it is intended for the support of the beneficiary for his life, and that if he attempts to dispose of any portion of the corpus his interest shall be forfeited and go over to other beneficiaries (*m*).

Absolute gift of personalty, with provision that the property should go over if it should be aliened by act or operation of law (*n*).

Bequest of a government annuity for life, with a direction that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell his annuity the same should cease and form part of the residuary estate of the testatrix (*o*).

Direction that property, which has been absolutely bequeathed, shall not be delivered to the beneficiary until he shall attain twenty-five years of age, or some other age greater than twenty-one years, or until marriage (*p*).

“A bequest of personalty to a person in tail is a bequest to him absolutely; and a bequest to some one else subject to the interest given to him is repugnant and void if the legatee survives the testator” (*q*).

The doctrine of repugnancy is not confined in its operation to estates in fee and other absolute interests; it is equally applicable to estates tail.

“The right of the actual tenant in tail to enlarge his estate to a fee simple cannot be restricted by any attempt on the part of the settlor or testator, by inserting clauses either that he shall not exercise the right, or by defeating the estate tail in case he exercises the right” (*r*).

(*m*) *Bradley v. Peixoto*, 4 R. R. 7.

(*n*) *Metcalfe v. Metcalfe*, 43 Chy. D. 633.

(*o*) *Hunt-Foulston v. Furber*, 3 Chy. D. 285.

(*p*) *Curtis v. Lukin*, 5 Beav. at pp. 155-6; *Re Young's Settlement*, 18 Beav. 199; *Re Jacob's Will*, 29 Beav. 402; *Gosling v. Gosling*, Johns. 265; *Re Wrey. Stuart v. Wrey*, 3 Chy. D. 507; *Wharton v. Masterman*, (1895) A. C. 186.

(*q*) *Per Lindley, L.J.*, in *Re Lowman*, (1895) 2 Ch. at p. 354.

(*r*) *Per Lord Penzance*, adopting the words of *Jessel, M.R.*, in *Dawkins v. Penrhyn*, L. R. 4 App. Cas. at p. 64; and see *Re Colliton & Landergan*, 15 Ont. R. 471.

Not only is the right of alienation one of the necessary incidents of property, but so also is the right to enjoy the property in its then present condition without alienating the same. Therefore where property, either real or personal, is left to a person, with the provision that if he shall die without having disposed of it, then it shall go over to other purposes, the said provision is void as being repugnant to the absolute interest firstly conferred (s).

“ Any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the incidents of that estate, is void. . . . Any executory devise to take effect on an alienation or on an attempt at alienation is void, because the right of alienation is incident to every estate in fee simple as to every other estate. Another illustration of the same principle is that which arises where the executory devise over is made to take effect upon not alienating, because the right to enjoy without alienating is incident to the estate given ” (t).

The same rules as to repugnancy apply to an estate settled in trust for a beneficiary, as in a case where the legal estate is conveyed to the beneficiary without any trust being created (u).

If an estate in fee is vested in interest, a condition against alienation is bad, although the estate is not in possession, but in reversion or remainder (v).

*Limited Restraint.*—The right to impose a limited restraint upon the alienation of an estate in fee is, as explained by Mr. Justice Pearson, an exception to the general rule of law, which exception is not founded upon reason, and appears to be of chance origin; yet our Courts in this Province have gone further than the Courts of any other country in the English speaking world in following this exception and expanding the

(s) *Holmes v. Godson*, 8 DeG. M. & G. 152; *Ross v. Ross*, 20 R. R. 263.

(t) *Per Fry, J.*, in *Shaw v. Ford*, 7 Chy. D. at p. 674.

(u) *Re Dugdale*, 38 Chy. D. 176; and see *Corbett v. Corbett*, 14 P. D. 7, and at p. 12.

(v) *Powell v. Boggis*, 35 Beav. at p. 539.

operation thereof, until they have caused the general rule to be almost absorbed in the exception. If any one mode of alienation, such as a power to devise, or settle, or lease, or mortgage, is left uncovered by the restriction, or if the restriction is confined in its operation to a particular period, as, for example, to the lifetime of the devisee, our Courts are inclined to hold the restriction valid, because, they say, it does not substantially take away all right of alienation. This is entirely opposed to the current of English cases, of which some examples will be given, showing restrictions, which were limited and not absolute, and yet were held to be invalid, because they did attempt to substantially take away that right of alienation which was inherent in the estate given.

Mr. Justice Pearson quotes Coke as authority for the proposition that an absolute restraint upon alienation is repugnant to a previously granted estate in fee, and further quotes as follows from the same source, to show that a partial restraint upon alienation is held to be valid:—"But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such condition is good." Mr. Justice Pearson then proceeds to say, "I confess I am absolutely at a loss to understand how that exception arose, because it is plainly just as much repugnant to the gift as any other condition would be, for the implied power given to alien to any person or persons he pleases includes a liberty to alien to J. S. if he chooses to do so. It seems to me that, unintentionally and unwittingly, another principle has been applied here (forgetting entirely that the question whether the condition was good or bad should be determined by its repugnancy to the prior gift), and that the question of policy has been allowed to intervene, omitting altogether all considerations of repugnancy" (*w*).

In the following cases the attempted restrictions have been held to be repugnant and void, although they were of a limited character:—

(*w*) *Re Rosher*, 26 Chy. D. at p. 813.

Restraint limited to selling (*x*). Limited to selling and leasing; limited also in time to the life of a living person other than the devisee (*y*). Restrictive condition attached to a legacy, limited to selling (*z*). Restraint limited to selling or mortgaging; the Court said, "If it could be read as applying to the equitable estate in fee, it would be repugnant and void" (*a*). Limited to alienation to specified persons (*b*). Restraint did not purport to prevent devisee from disposing of the property by will (*c*). Restraint did not deprive beneficiary of the power of disposing of the property by will or instrument inter vivos, but insisted that he should so dispose of it, and this was held to be repugnant to his right of personal enjoyment (*d*). Limited to mortgaging or suffering a fine or recovery (*e*). Limited to alienation by bankruptcy (*f*). Limited to alienation by act or operation of law (*g*). Limited in time to twenty-one years after testator's death (*h*). Limited as to time, and even that restriction was to be removed if the devisee survived twenty-one and made a will (*i*). Restrictive direction limited as to time (*j*). Limited to prohibition against raising rent (*k*). Limited to anything which should deprive devisee of the personal beneficial enjoyment of the property for his lifetime (*l*).

(*x*) *Attwater v. Attwater*, 18 Beav. 330.

(*y*) *Re Rosher*, 26 Chy. D. 801.

(*z*) *Powell v. Boggis*, 35 Beav. at pp. 536, 538.

(*a*) *Per Proudfoot*, V.C., in *Crawford v. Lundy*, 23 Gr. at p. 250; the same restraint is similarly dealt with by Falconbridge, J., in *Re Shanacy & Quinlan*, 28 Ont. R. 372.

(*b*) *Ludlow v. Bunbury*, 3 Beav. 36.

(*c*) *Corbett v. Corbett*, 14 P. D. 7.

(*d*) *Shaw v. Ford*, 7 Chy. D. 673; *Re Yalden*, 1 DeG. M. & G. 53; and see *Re Wilcock's Estate*, 1 Chy. D. 229.

(*e*) *Ware v. Cann*, 10 B. & C. 433.

(*f*) *Re Machu*, 21 Chy. D. 838.

(*g*) *Metcalf v. Metcalf*, 43 Chy. D. 633.

(*h*) *Renaud v. Tourangeau*, L. R. 2 P. C. 4.

(*i*) *Holmes v. Godson*, 2 DeG. M. & G. 152.

(*j*) *Curtis v. Lukin*, 5 Beav. at pp. 155-6; *Re Young's Settlement*, 18 Beav. 199; *Re Jacob's Will*, 29 Beav. 402; *Gosling v. Gosling*, Johns. 265; *Re Wrey*, *Stuart v. Wrey*, 3 Chy. D. 507; *Wharton v. Masterman*, (1895) A. C. 186.

(*k*) *Attorney-General v. The Master of Catherine Hall, Cambridge*, 23 R. R. 92.

(*l*) *Re Dugdale*, 38 Chy. D. 176.



Pearson, J., intimates that if a devisee were validly restricted from selling the devised property he would not be permitted by the Court to make a lease thereof for 999 years, because a man will not be permitted to substantially do in an indirect way that which he cannot do directly, and for the same reason he holds that, under such a prohibition against sale, the devisee would be restricted from mortgaging the property for its full value, and accordingly he holds that a restraint against selling amounts substantially to a restraint against all alienation, and is therefore invalid (*m*).

This view is diametrically opposed to that of Sir George Jessel, M.R., in *Re Macleay* (*n*), in which case the restriction upon the devisee was that "he never sells out of the family." The Master of the Rolls held that family meant blood relations, and the restraint was valid because a restraint upon selling except to a man's blood relations does not substantially take away all power of alienation. In this connection he says:—"You may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family" (*o*).

*(To be concluded.)*

A. H. MARSH.

(*m*) *Re Rosher*, 26 Chy. D. at pp. 819, 820.

(*n*) L. R. 20 Eq. 186.

(*o*) At p. 189.

## EDITORIAL REVIEW.

**Changes in the Judiciary.**

After a long and honourable performance of duties, Chief Justice Hagarty, the late Chief Justice of Ontario, retires to enjoy a well-earned rest. Chief Justice Hagarty was appointed to the Bench in the year 1856, and, on his retirement in the present year, had therefore completed 41 years of continuous service.

It is difficult to express our appreciation of his long and valuable services without bordering upon the realms of flattery, and yet we cannot allow the occasion to pass without expressing the universal admiration of the profession at the patient performance of his arduous duties with exceptional ability for so many years. The learned Judge's extraordinary abilities, combined with an unusual experience, had earned for him the most unbounded confidence in his decisions; and the occasional display of a very shrewd and keen wit, and the disposal of sophisms by a display of caustic humour at times, could readily be forgiven when mature consideration had proved the soundness of his views. It must ever be the case that a Judge of unusual ability will sometimes display impatience during the course of an argument. The calm atmosphere in which he sits enables him to foresee with greater rapidity than counsel, the end to which an argument may lead, and if the position is clearly untenable, the little impatience is readily excusable. This extraordinary ability of detecting fallacies the late Chief Justice possessed without question, and if caustic or impatient remarks are remembered by a few, it will be attributed to his wonderful powers of seeing at once the unsound arguments presented to the Court. We wish the learned Judge a long life to enjoy the rest which he has earned with the greatest honour.

The place of the Chief Justice has been taken by Mr. Justice Burton, who after twenty years of service on the Bench, now occupies the highest judicial position in the Province. He was appointed to the Court of Appeal at its establishment in 1874, and has continuously enjoyed the confidence of all who have appeared before him. His uniform politeness and deference to the Bar, whether listening to the most skilful sophism of an experienced counsel, or the crudest departure from principle of the most inexperienced, endear him to every one who appears before him, and the profession at large will cheerfully join in offering him congratulations upon his attaining the highest position in the Province.

The vacancy thus occasioned is now filled by the appointment of Mr. Charles Moss, Q.C., who is the second of his family to sit in that Court in the same position. His brother, the late Chief Justice Moss, was appointed to the Court as Junior Justice in 1875, and after a lapse of twenty-two years, Mr. Moss now takes his seat in the same place amid the congratulations of the Bar. His wide experience in equity will give strength to the Court.

It is a very curious circumstance that every member of the late firm of Harrison, Osler & Moss, with the exception of Mr. Foster, Q.C., who died several years ago, has now been appointed to the Bench. At the time when the writer was a student in the firm, the late Chief Justice Harrison, the late Chief Justice Moss, the present Mr. Justice Moss, the late Mr. Foster, and Mr. Justice Falconbridge were all members of the firm. Three out of the five are now upon the Bench.

#### **The Statute of Limitations and Solicitors' Bills.**

In *Coburn v. Colledge*, 13 Times L. R. 321, the important point was decided by the Court of Appeal, affirming the judgment of Mr. Justice Charles, that the Statute of Limitations begins to run against a solicitor when he has completed his work, and not when he has delivered his bill. The right to receive the fees arises as soon as the work is completed. The delivery of a signed bill is essential, not to entitle him to payment,

but to entitle him to bring an action. The delivery of a bill touches the remedy for enforcing the cause of action, not the cause of action itself.

**Landlord and Tenant—Forfeiture—Waiver.**

In a very neat way, in *Bevan v. Barnett*, 13 Times L. R. 310, the point arose which has previously arisen in other cases of waiver of forfeiture of a lease by demand of rent accruing after the cause of forfeiture. The action was to recover premises for breach of covenant to repair, the lease containing a clause for re-entry. The writ of summons claimed arrears of rent, which accrued after the cause of forfeiture occurred. It is noticeable that the claim for rent was not repeated in the statement of claim. Objection was taken to the action, on the ground that the claim for rent was a waiver of the forfeiture, and therefore the plaintiff could not recover the premises. Wright, J., held that the claim on the writ was a waiver of the forfeiture, being inconsistent with a claim for possession, and refused leave to amend the writ as it could not alter the effect of the waiver. The point, of course, has been before decided, that a claim for rent accruing after a cause of forfeiture is a waiver, as the tenant cannot at once be tenant paying rent and wrongfully in possession. But in no previous case has the point so neatly arisen, or on such a slender act of waiver.

**Auctioneer's Authority to Sign for Purchaser.**

An important case on this subject is *Bell v. Balls*, 13 Times L. R. 274. The defendant was asked by the auctioneer to give him a bid, and he did so. The bid did not reach the upset price, but after consultation with the vendor the auctioneer knocked down the land to the defendant. No memorandum was signed, and the defendant, having left the room, refused to sign one when sent for, but the auctioneer's clerk had in the meantime filled up a form of contract. The auctioneer, a week later, filled up a memorandum of the purchase, and signed for the purchaser. The action to enforce the sale was dismissed. As to the clerk's authority, Mr. Justice Stirling said, "It has been decided that upon a sale by

auction the auctioneer is the agent of the purchaser as well as the seller, and has authority to sign a memorandum of the sale so as to bind both parties, and if the memorandum or a copy of the particulars had been filled up by the auctioneer with his own hand in the same way as the memorandum now in question was filled up by the clerk it would have been sufficient. An agent, however, could not as a rule delegate his authority. . . . In the present case the defendant did not by word, sign, or otherwise, authorize the auctioneer's clerk to sign on his behalf." That is, there was no direct authority from the bidder to the clerk to sign for him, such as might have arisen from an express request or an equivalent gesture. The Court then referred to the exigencies of the case, and refused to hold that they required the authority in the clerk to be implied.

Referring to the extent of the auctioneer's authority, the report proceeds, after referring to authorities, "The authority which the purchaser conferred upon the auctioneer was to write down the bidding—that was, to make a minute or record of it at the time, and as part of the transaction, and such a record was held a memorandum sufficient to satisfy the statute. His Lordship did not see that the nature of the proceeding justified the implication of an authority to make a memorandum, except at a time when the writing down could fairly be held to be a part of the sale. If the auctioneer were allowed to record the bidding at a later time, evils might arise similar to those which the Statute of Frauds was intended to prevent."

Referring to the purchaser's right to withdraw the authority to sign at the time of the sale, his Lordship said that he shared with Lord Romilly his reluctance to hold that upon a sale under ordinary circumstances the vendor or the purchaser could say after a lot had been knocked down, "I am not satisfied with the price, and withdraw the authority given to the auctioneer." That, however, raises the question whether a bidder can retract his bid. And the opinion of Lord St. Leonard, who suggested the condition against withdrawing bidding, was that it was in terrorem only, and could not

be enforced. Any principal can withdraw his agent's authority before it has been acted upon, unless it is coupled with an interest or given for consideration. And no limit of time must elapse before he can annul his own act. We have before discussed this point, and the cases will be found collected in vol. iv., p. 553.

**The Land Titles Act and Statute of Limitations.**

It was thought, apparently, at the time the Land Titles Act was passed that, as the certificate of title was absolute in its terms, following the statutory provisions, the Statute of Limitations, if allowed to run against the registered owner, who might under his certificate claim his land at any time, would be a serious objection to the system, and consequently a clause was inserted, which provides that no length of possession adverse to the registered owner will affect his title. The fear was well grounded, for the Privy Council has decided that there is nothing in a similar Act in British Honduras which will prevent the operation of the Statute of Limitations against a registered owner, though no means is provided for registering as owner one who becomes entitled by adverse possession: *Belize Estate & Prod. Co. v. Quilter*, 13 Times L. R. 347.

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## BOOK REVIEW

*A Treatise on the Law of Evidence as administered in England and Ireland*, with illustrations from Scotch, Indian, American and other legal systems, by the late Judge Pitt Taylor. Ninth edition (in part rewritten), by G. PITT LEWIS, Q.C., with notes as to American Law by CHARLES F. CHAMBERLAYNE. Two volumes. London, Sweet & Maxwell, Limited; Boston, The Boston Book Co.; Toronto, The Carswell Company, Limited 1897.

The eighth edition of Taylor on Evidence was the last edited by the author, and appeared in 1885. The present editor's aim has been to "render the work which he is editing one which the author would have produced if writing at the present day," and the work has gained greatly by his efforts. The English and Irish decisions and English legislation, which have appeared since the eighth edition, have been noted, overruled or practically effete cases have been cut out and many improvements have been made which save space and add clearness and value. For example, numerous illustrations of principles have been carried from the text to the foot note, and are found there condensed and arranged alphabetically. To provide for the growing bulk of Canadian and American cases, well written and concise notes of the American Law (which contain many Canadian cases) are given separately at the end of each chapter, and there are a separate index and table of cases to these notes.

A new method of referring to cases is adopted. A complete table of all cases cited throughout the work, with the date of decision, and a reference to every known report of it, including the first twenty volumes of the Revised Reports, is added to each volume—thus: *Wheaton v. Maple*, (1893) 3 Ch. 48; 62 L. J. Ch. 963; 68 L. T. 641; 69 L. T. 208; 41 W. R. 677, § 119, etc. The foot notes to the text give the name of the decision cited and

its date (and in English cases the name of the Court or Judge) the table of cases being relied on to furnish the reference to reports. Much space is thus saved, and the method enables a practitioner who may have only one series of reports for any given period, to turn up the case at once if reported in his series, whatever that series may be. The mode of citation commonly used in text books entails a troublesome and often fruitless search in other publications for a reference, if the foot note does not chance to mention the particular series of reports at hand. The new method supplies the remedy, and the great labour involved in preparing such a table of cases is more than repaid by the increased usefulness of the work to the profession generally, and particularly to those who have not ready access to a large collection of reports. In view of the modern developments in the law of evidence, it is also peculiarly useful to have the date of decision mentioned in each case.

The editor has condensed the text wherever it was possible to do so without impairing its value, and by condensation and the various expedients adopted to save space, he has succeeded in presenting the work revised to 31st July, 1895, in 1234 pages, instead of the 1600 pages occupied by the eighth edition. The indices are full and complete, and Tables of Statutes and Rules referred to have been inserted.

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# THE CANADIAN LAW TIMES.

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JUNE, 1897.

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## THE FORM OF AN INTERPLEADER ISSUE.

**I**N an interpleader issue, the Court may direct which of the claimants is to be plaintiff and which defendant (a). The proper rule to be followed is to put in the position of plaintiff the party upon whom the substantial onus of proof should properly rest (b); although it has been said that it is often immaterial which party is plaintiff (c).

The claimant who is made plaintiff has the right to begin (d).

Where a garnishee admitted his liability to the judgment debtor, but suggested that one B. claimed the money under an assignment, upon settling the issue the claimant B. was made plaintiff (c).

In sheriffs' cases, when the property has been seized in the possession of the execution debtor, the adverse claimant, as a general rule, is made plaintiff in the issue. It lies on the claimant to prove clearly that the goods are his, because possession by the debtor is *prima facie* evidence of title in the debtor (f); and the claimant

(a) Rule 1147.

(b) *Doran v. Toronto Suspender Co.*, 14 P. R. 103; *McKay v. Grant*, 14 C. L. T. Occ. N. 23.

(c) *Bryce v. Kinnee*, 14 P. R. 509.

(d) *Alexander v. Handy*, 11 Ir. L. R. 328.

(e) *McPhillips v. Wolf*, 4 Man. L. R. 301; 7 C. L. T. 216.

(f) *Bentley v. Hook*, 4 Tyr. 229; *Yorke v. Smith*, 21 L. J. Q. B. 53; *Curlewis v. Magan*, 7 Jur. N. S. 1187; *Tremont v. Manly*, 60 Pa. St. 384.

will be made plaintiff, although at the time of seizure the debtor was in possession as the claimant's bailee (*g*).

When the property is in the possession of the claimant when seized, the onus is on the execution creditor, and he should be made plaintiff in the issue (*h*). It makes no difference that at the time the writ was placed in the sheriff's hands, the debtor alone was in possession (*i*).

It has been said, however, that when the claimant claims title by transfer from the execution debtor, the former should, as a general rule, be made plaintiff in the issue, whether the goods be in his possession or in that of the execution debtor at the time of the seizure, because it is generally reasonable that the claimant should be required to prove his title, and that subject to this rule the person out of possession should be plaintiff (*j*).

It frequently happens that both the debtor and the claimant are in possession when the sheriff seizes. If the debtor is tenant or owner of the premises, or the goods are such as can only be used by him, the claimant will generally be made plaintiff. On the other hand, if the claimant is tenant or owner, or the goods are such as can be used by him alone, the onus will be on the execution creditor. Thus when husband and wife live together in the same house, the husband being tenant or owner, and the wife claiming household goods, not being articles for personal use, such as jewellery, clothing and the like, she must make out her claim, and she will be made plaintiff (*k*). Where a doctor's horse and medical books were seized and claimed by his wife, she was made plaintiff (*l*). In Manitoba when a husband works

(*g*) *Ellis v. Cheesboro*, 14 C. L. T. Occ. N. 292. Contra, *Dominion v. Kilroy*, 12 P. R. 19; 7 C. L. T. 87.

(*h*) *Hammill v. De Wolf*, 10 C. P. 419; *Davis v. Levey*, 11 C. P. 292; *Duncan v. Tees*, 11 P. R. 66 & 296; *Freehold Loan v. Bryson*, 27 C. L. J. 120. See contra, *Wingfield v. Fowlie*, 14 Ont. R. at p. 107.

(*i*) *Union Bank v. Tizzard*, 9 Man. L. R. 149; 13 C. L. T. Occ. N. 324.

(*j*) *Doran v. Toronto Suspender Co.*, 14 P. R. 103.

(*k*) *Hogaboom v. Grundy*, 16 P. R. 47; *Bolster v. Walker*, 30 C. L. J. 140.

(*l*) *Walker v. Williams*, (1890), per Galt, C.J., not reported.

the wife's farm, and crops or stock are seized under an execution against the husband, and the wife claims, she will be made plaintiff (*m*).

Sometimes the goods, when seized, are in the possession of neither the debtor nor the claimant. Where goods were deposited with a trust company by the claimant, and the sheriff interpleaded upon an intention to seize, the execution creditor was made plaintiff (*n*).

If instead of an issue an action is directed, the Court may order that any claimant be made a defendant in any action already commenced, in lieu of or in addition to the applicant (*o*). And if two actions have been commenced, the plaintiff in the second will be made defendant in that which was commenced first (*p*).

Interpleader issues are directed to inform the conscience of the Court, and unless they are framed with a view of meeting the real questions likely to arise, they are of little practical benefit (*q*); the object being to inform the Court which of the parties is entitled to the property in question, or whether each is entitled to a part (*r*). It is immaterial in a sheriff's case whether the issue refers to the goods seized, or the goods seized or any part thereof; under the former words the claimant may prove ownership to part of the goods (*s*).

The form of issue in a stakeholder's interpleader is usually a simple issue, as, whether the plaintiff or the defendant is entitled to the subject matter, or whether the plaintiff is entitled to the goods as against the defendant (*t*).

In a sheriff's case, where the property has been seized in the possession of the execution debtor, the issue

(*m*) *Ady v. Harris*, 9 Man. L. R. 134; *Strierner v. Merchants' Bank*, 9 Man. L. R. 546; *Doll v. Conboy*, 9 Man. L. R. 185; *Slingerland v. Massey*, 10 Man. L. R. 21; *Rae v. Garbutt*, 14 C. L. T. Occ. N. 187; *O'Neil v. Farr*, 15 C. L. T. Occ. N. 345.

(*n*) *Schener v. Gordon*, per Rose, J., not reported.

(*o*) Rule 1147.

(*p*) *Sickles v. Wilmerding*, 59 Hun. N. Y. 375.

(*q*) *Bryce v. Kinnee*, 14 P. R. 509.

(*r*) *Price v. Plummer*, 26 W. R. 682; 39 L. T. 38, 657.

(*s*) *Stevens v. McArthur*, 6 Man. L. R. 3; 9 C. L. T. Occ. N. 236.

(*t*) See *Ross v. Edwards*, 14 P. R. at p. 526.

is "as to whether it was the property of the claimant at the time of the seizure as against the execution creditor." The onus is on the claimant. Where money realized by a sheriff was claimed by a receiver the issue was, whether the money in the hands of the sheriff was the property of the claimant as against the execution creditor (*u*).

Where a receiver interpleaded, the issue was, whether the claimant, a liquidator, or the creditors who had obtained the receiving order, were entitled to the amount of a balance which had come to the hands of the receiver (*v*).

Other questions than the trial of a bare issue may be directed, such as the validity of an execution creditor's judgment against creditors generally, and that it shall be open to an attacking creditor to show that the plaintiff's judgment is void through fraud, or as being a preference (*w*). One party to the issue may be ordered to make certain admissions at the trial, in order that the real dispute between the parties may be settled, and that the rightful claimant may not be defeated by the absence of some link in the chain of formal proof (*x*).

As an issue is directed to ascertain facts with a view to ulterior proceedings, it has been said that there is no reason why the Court may not for such purpose vary the legal positions and rights of the parties, by directing that a partnership or bankruptcy shall not be set up, or that a witness wholly incompetent in point of law shall be examined upon the trial (*y*).

It is not proper to allow a claimant to add to the issue a plaint against the execution creditor for damages for trespass (*z*).

Where goods have been seized in the possession of

(*u*) *Dibb v. Brooke*, L. R. (1894) 1 Q. B. 338; *Alexander v. Handy*, 11 Ir. L. R. 328; *Larkin v. Graham*, 2 New South Wales L. R. 65; *Schollinberger v. Fisher*, 1 Leg. Rec. Pa. 353.

(*v*) *Levasseur v. Mason*, L. R. (1891) 2 Q. B. 73.

(*w*) *Leech v. Williamson*, 10 P. R. 226.

(*x*) *Pooley v. Goodwin*, 5 N. & M. 466; 1 H. & W. 567.

(*y*) *Woodford v. Bosanquet*, 5 Q. B. at p. 321; D. & M. 419.

(*z*) *Oliver v. Lewis*, W. N. (1889) 224.

the claimant, the usual form is, "whether at the time of the seizure the goods in question were eligible under the execution creditor's execution as against the claimant." There should be no doubt from the issue, that the onus is upon the creditor to show his right to have the seizure made (a).

The proper form of issue between a claimant and an attaching creditor, is whether the goods taken under the attachment were at the time of the seizure the property of the claimant as against the attaching creditor, and not as against the absconding debtor. It must be assumed that the attaching plaintiff is a creditor in fact (b). Where a contest was between an execution creditor and an attaching creditor, an issue was directed as to whether the judgment creditor's judgment and execution were fraudulent and void as against the plaintiff and his attachment (c).

Where it is intended that only the debtor's special interest in the goods shall be sold by the sheriff under an execution, and not the goods themselves, the issue must be framed to meet such a case, namely, the right of the claimant as against a sale of the interest of the debtor (d).

In stakeholders' interpleader, the plaintiff in the issue must generally show that the property was his at the time he made his claim.

In framing the issue upon a sheriff's application, the general rule is, to make the party upon whom the onus is placed show that he was entitled to the goods in question at the time of the seizure, not at the time of the delivery of the writ to the sheriff. The substantial fact to be tried must always be whether the sheriff rightfully interfered with the property, in other words, can the claimant show that when seized the goods were his as against the execution creditor (e)?

(a) *Duncan v. Tees*, 11 P. R. 66 & 296.

(b) *Doyle v. Lasher*, 16 C. P. 263.

(c) *Hall v. Kissock*, 11 U. C. R. 9.

(d) *Muckleston v. Smith*, 17 C. P. 401.

(e) *Van Every v. Ross*, 11 C. P. 133; *Keeler v. Hazlewood*, 1 Man. L. R. 31.

In England, since 1856, the goods of an execution debtor, as against a purchaser for value without notice, are only bound from the time of the seizure by the sheriff (f). In Ontario they are bound from the time of the delivery of the writ to the sheriff to be executed (g), and the law seems to be the same in Pennsylvania (h). It has been held in New South Wales that the lodging of the writ of fi. fa. with the sheriff is a judicial act, and binds the goods from the earliest possible hour of the day (i).

It has been pointed out in Ontario, that the form of the issue follows the practice established in England under the Statute of 1856, which has not been enacted in the Province, and makes the question of title relate to the date of the seizure, and not of the delivery of the writ to the sheriff (j). On this issue the question will arise, whether the property was or was not bound from the time of the delivery of the writ (k).

Although in Ontario the goods of a debtor are bound from the delivery of the writ, yet the property in them is not changed by it, and is still in the debtor, and he may sell them subject to the rights of the execution creditor, to which they will be liable in the hands of a purchaser (l), from whom they may be taken by the sheriff (m).

In many cases it does not make any difference that the plaintiff has to show title at the time of the seizure, because he will generally have to show that the goods were his at the time the writ was placed in the sheriff's hands, in establishing his claim to them at the time they were seized. In some cases the issue has been as to the ownership at the time of the delivery of the

(f) 19 & 20 Vict. c. 57, s. 1.

(g) Rule 859; 29 Charles II. c. 3, s. 16.

(h) Lafferty v. Cormick, 1 W. N. C. Pa. 267.

(i) Thompson v. De Lissa, 2 New S. Wales L. R. 165.

(j) Whiting v. Hovey, 13 App. R. at p. 14.

(k) Levy v. Hart, 7 N. S. Wales S. C. R. 142.

(l) Samuel v. Duke, 3 M. & W. 622.

(m) Patterson v. McKellar, 4 Ont. R. 407; Roach v. McLachlan, 19 App. R. 496; Breithaupt v. Marr, 20 App. R. 689.

writ (*n*), in others as to ownership at the time of the seizure, and always so when the property is only bound from the seizure (*o*). In some cases the issue has been as to whether the goods during the currency of the execution were the property of the claimant as against the execution creditor (*p*).

If a claimant can show a valid title to goods, and the title had its origin before the seizure, it would of course be fatal to his interests to have the issue as of the time of delivery (*q*).

R. J. MACLENNAN.

(*n*) *Ovens v. Bull*, 1 App. R. 62; *Feehan v. Bank of Toronto*, 10 C. P. 32.

(*o*) *Vindia v. Wallis*, 24 U. C. R. 9; *McMaster v. Milne*, 2 P. R. 386; *McDowell v. McDowell*, 10 C. L. J. O. S. 48; 1 Ch. Ch. 19.

(*p*) *Holden v. Langley*, 11 C. P. 407; *Paterson v. Langley*, 11 C. P. 411.

(*q*) *Van Every v. Ross*, 11 C. P. 133; *McMaster v. Milne*, 2 P. R. 386.

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## RESTRAINTS ON ALIENATION.

(Concluded).

*Limited Interest with Superadded Power or Restriction.*—We have already seen that an estate in fee cannot be devised to a man subject to a condition which is so restrictive of his property rights as to be repugnant thereto; but the object which a testator has in view in attempting to impose such restrictions may usually be attained by devising a limited interest, instead of an estate in fee, and superadding thereto certain powers, which powers are to be exercised subject to the desired restrictions.

Lord Romilly, M.R., after referring to the inability of a testator to couple with a gift a condition that the donee shall not dispose of what is given, says:—"This does not interfere with the power of a testator to limit a property in a particular way; he may give it to A. B. for life, with power to dispose of it by deed or will in favour of particular persons, with a gift over to other persons if he fail so to dispose of it" (p).

"The rule of law which prevents a party from imposing fetters upon property inconsistent with the nature of the interest given, is precisely the same, I apprehend, in personal as in real estate. Thus, where the subject is a personal chattel it is impossible so to tie up the use and enjoyment of it as to create in the donee a life estate which he may not alien; although the object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a particular event or

(p) *Powell v. Boggis*, 35 Beav. at p. 539; and see upon this point *Bradley v. Peixoto*, 4 R. R. at p. 10; *Ross v. Ross*, 20 R. R. at p. 266; *Cuthbert v. Purrier*, 23 R. R. at p. 106; *Hood v. Oglander*, 34 Beav. at p. 522; *Re Johnston*, *Mills v. Johnston*, (1894) 3 Ch. at p. 208.



on a particular act being done; *for in that case the donee takes by the limitation a certain estate, of which the event or act is the measure*; and upon the happening of the event, or the doing of the act, a new and distinct estate accrues to a different individual" (q).

"You cannot limit an estate to a man and his heirs *until he shall convey the land to a stranger*, because it is of the essence of an estate in fee that it confers free power of alienation, and it has long been settled that the same principle is applicable to gifts of personalty. In favour of the will, which must be read and construed as a whole, *you can allow such a proviso to defeat any particular estate*, not as operating to take away that which has already been given, but *as restricting the quantity of the original gift*; but *an estate in fee or its equivalent, an absolute gift of personalty, does not admit of such treatment*" (r).

This indicates that where a particular estate, such as an estate for life, is given by words which, if standing alone, would give an absolute estate of that particular quality, yet there may be restrictive words superadded thereto, and, in such case, the original words of gift will be read and construed along with the superadded restriction, and will be taken to confer not a life estate but some "fancy estate," which is something less than a life estate, that is, a life estate which is subject to certain restrictions; but if the estate first conferred be an estate in fee, instead of a life estate, the law will not allow that to be converted into a "fancy estate" in a similar manner by superadding restrictive words, but in such case the restrictive words will be repugnant to the grant and therefore void.

"If an estate in fee is given by a will or other instrument, with a proviso which is in law a *condition subsequent defeating the estate on alienation or on bankruptcy*, the condition is void. It is said that there may

(q) *Per* Lord Brougham, L.C., in *Woodmeston v. Walker*, 2 Rus. & Myl. at p. 204; and see *Re Mabbett*, (1891) 1 Ch. at p. 713.

(r) *Per* Kekewich, J., in *Metcalf v. Metcalfe*, 43 Chy. D. at p. 639; and see *Corbett v. Corbett*, 14 P. D. at pp. 11, 12.

be a limitation to a man . . . until he shall attempt to alienate or become bankrupt. *It is settled that such a limitation is good with reference to a life estate; but there is no express authority, so far as the researches of Counsel have extended, and so far as my memory serves me, in which the point has been decided that a limitation in fee to a man until he shall alienate or become bankrupt is good*” (s).

Where goods were bequeathed absolutely to a beneficiary (as distinguished from a mere life interest), and it was declared that the bequest was for her aliment and was not attachable by her creditors, and that should any creditor succeed in attaching the same, then the said goods should revert to the general fund of the testator's estate, it was held in a contest between the legatee and the reversioner that the reversion over of the chattels was invalid, and that the legatee took an absolute interest therein (t).

Property cannot be given for life any more than absolutely without the power of alienation being incident to the gift; so that if there be a gift to a man for life with a mere provision directed against alienation, but no provision that in the event of alienation the life estate shall cease, or the estate shall pass over to another beneficiary, the provision against alienation is ineffective, and the life tenant may deal with his life interest as he pleases (u).

If the life estate have annexed to it a restraint against alienation, with a provision that upon alienation the estate shall pass over, this provision will be effective for the purpose mentioned; but it is not necessary in order to make such restraint effective that there should be a gift over; it will be sufficient if there is a provision that upon such alienation the estate of the tenant for life shall cease (v). So also it is sufficient if

(s) Per Chitty, J, in *Re Machu*, 21 Chy. D. at p. 842.

(t) *Barker v. Davis*, 12 C. P. 344.

(u) *Rochford v. Hackman*, 9 Hare, at p. 480.

(v) *Rochford v. Hackman*, 9 Hare, 475; *Joel v. Mills*, 3 K. & J. 458; *Hurst v. Hurst*, 21 Chy. D. at p. 283.

there be a gift over upon alienation, which gift over is ineffective because, in the event which happens, there is no person to take under such gift (*w*).

Although the rule is otherwise in so far as concerns the gift of a fee simple estate, yet it is well settled that there may be an *absolute gift of a life estate*, followed by a provision that if by any act of the donee or anything done, suffered or permitted by him, or by act or operation of law the said estate shall become charged or aliened, the said life estate shall cease or shall go over (*x*).

*Conditions and Executory Limitations.*—By no scheme or device, whether by way of condition or springing or shifting use or executory devise or otherwise, can an absolute restraint on alienation be imposed upon an estate in fee simple which has once become vested in interest (*y*).

“The difference between a condition, properly so called, and a conditional limitation or an executory devise is that, in the case of a condition the estate is to revert to the grantor or his heirs; in the other cases it is to be limited over to other persons” (*z*).

“Limitations defeating a portion of an estate previously given are properly termed conditional limitations, to distinguish them on the one hand from conditions of which only the grantor or his heir can take advantage, and on the other hand from remainders in the strict and proper sense of the word, . . . and although these conditional limitations are not valid in conveyances at common law, yet, within certain limits, they are good in wills and conveyances to uses,” that is to say, they may, within certain limits, be good as springing or shifting uses or executory devises (*a*).

(*w*) *Hurst v. Hurst*, 21 Chy. D. 278.

(*x*) *Hurst v. Hurst*, 21 Chy. D. 278; *Metcalf v. Metcalf*, 43 Chy. D. at p. 639; *Ex p. Eyston*, 7 Chy. D. 145.

(*y*) See *per Fry, L.J.*, in *Re Parry & Daggs*, 31 Chy. D. at p. 130; and *per Kay, J.*, in *Re Dugdale*, 38 Chy. D. at p. 182.

(*z*) *Per Kay, J.*, in *Re Dugdale*, 38 Chy. D. at p. 179.

(*a*) *Per Kay, J.*, in *Re Dugdale*, 38 Chy. D. at p. 180.

“The principle that existed in the minds of the old lawyers is clear; they held that an estate could be limited to a person *until the happening of an event*, and then over, so that when the event happened the estate in that person ceased and went over; but that if a deed or will contained a *devise or gift of an estate in fee simple*, and then went on to state that *provided something happened the estate should be defeated*, that was a condition, and void *because it could not operate as a remainder at common law*. Therefore in the law of real property a distinction was made between a condition pure and simple and a conditional limitation; and that distinction subsists at the present day” (b).

In the case lastly referred to, the testator devised a freehold estate to the use of his daughter, her heirs and assigns, for her separate use, “Subject nevertheless to the proviso hereinafter contained for determining her estate and interest in the event therein mentioned.” In a subsequent part of the will was a proviso that in case his said daughter should at any time be declared a bankrupt, then and thenceforth the devise thereinbefore made to her should be void, and the premises should thenceforth go, remain and to be to the use of the children.

It was admitted by Counsel that if the proviso was to be read as a simple condition it was repugnant and therefore void, but *it was argued that the proviso was made, by reference, a part of the gift itself, and that therefore the gift and the proviso must be read together, and not as separate clauses*, and that if they were so read the proviso operated as a conditional limitation which was perfectly good. It was in answer to this argument that Chitty, J., stated the propositions of law above quoted, and he held that the limitation to the daughter was not a conditional limitation, but that the condition as to the property going over upon bankruptcy

(b) *Per Chitty, J., in Re Machu, 21 Chy. D. at p. 843.*

was a condition pure and simple, and consequently repugnant and void (c).

“If an absolute interest be given upon an express condition, which may be lawful in itself, but is incompatible with the free enjoyment of the property, the Court does not modify the absolute interest, for the purpose of giving effect to the condition, but declares the condition void, for the purpose of supporting the absolute interest” (d).

A limitation by way of use in a deed, or in a will, to A. *for life* or until he shall attempt to alien, and upon that event to B. in fee, is valid, because A. takes an estate of freehold which only endures, by the terms of the limitation, until the attempted alienation, and B. takes a contingent remainder; but a limitation to A. *in fee* or until he shall attempt to alien, and thereupon to B. in fee, is invalid as to the gift over; it is a conditional limitation if contained in a deed, and an executory devise if contained in a will, and in either case it is an attempt to restrict the free right of alienation which inheres in the fee simple conveyed to A., and is therefore repugnant and void, and the result is that A. takes

(c) But see *Re Dugdale*, 38 Chy. D. at p. 182, where Kay, J., says that Mr. Justice Chitty in this case did not use the term “conditional limitation” in the sense in which it was used by Fearne and Butler, but rather to describe an estate upon which a contingent remainder might be limited. Fearne treats a conditional limitation in a deed as being equivalent to an executory devise in a will, that is, the whole fee is limited to the grantee, subject to the condition that it shall go over upon the happening of some specified event. Fearne distinguishes this from a contingent remainder, which arises when the whole fee is not limited to the grantee, but only a particular estate which is to endure until the happening of some specified event, with a limitation over on such event, which being an uncertain period, such particular estate is a freehold and the limitation over is a contingent remainder (see *Re Dugdale*, at p. 180). Mr. Justice Chitty, however, uses the term “conditional limitation” in the sense in which it is used by Sanders and Stephens, namely: “Where an estate is so expressly defined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail” (see *Re Machu*, 21 Chy. D. at pp. 842-3); that is, Mr. Justice Chitty uses the term “conditional limitation” to describe the estate which is usually spoken of as the freehold estate upon which a contingent remainder may be limited. This difference in the use of terms should be borne in mind when considering the expressions used by Mr. Justice Chitty in *Re Machu*, and by Mr. Justice Kay in *Re Dugdale*.

(d) *Per* Lord Langdale, M R., in *Byng v. Strafford*, 5 Beav. at p. 567; and see *Per* Lord Lyndhurst, L.C., in *S. C. sub. nom. Hoare v. Byng*, 10 Cl. & F. at p. 524.

a fee simple absolute; so also if real or personal estate be given to A. *for life* with remainder to B., with a proviso that if A. should attempt to alien, then his life estate shall cease, *such proviso will be construed as a limitation to A. during his life or until he shall attempt to alien*, and upon that event or after his death over, and such a limitation is held to be valid, although it would not have been valid if the estate given to A. had been an estate in fee instead of an estate for life; that is, a contingent remainder may be limited upon a particular estate of freehold, but not upon an estate in fee; moreover, a conditional limitation, or a springing or shifting use or an executory devise *may put an end to a particular estate of freehold*, or cause an estate to shift over or to spring into existence upon the happening of some future event, *even though that event be an alienation or an attempt at alienation* by the holder of the particular estate; but it cannot in such a case operate in that way upon a vested estate *in fee*, for although executory limitations, such as executory devises in a will or executory uses in a deed, may be made effective for the purpose of cutting short an existing estate, or bringing a new estate into existence in a way which would be impossible under a common law conveyance, for example by limiting an estate in fee upon a prior estate in fee which is liable to be brought to an end by the happening of some contingent event, yet, even in the case of such executory limitations, *the law will not allow the contingent event which is specified as the event that shall put an end to an existing estate in fee to consist in the exercise of any of the rights of property which are inherent in that estate in fee*, such as the right of alienation, although such a contingent event as that lastly mentioned may well be selected as the event the happening of which shall put an end to a particular estate (*e.g., a life estate*) as distinguished from an estate in fee (*e*).

(e) *Re Dugdale*, 38 Chy. D. at pp. 180-1; *Metcalf v. Metcalfe*, 43 Chy. D. at p. 639; *Re Machu*, 21 Chy. D. at pp. 842, 843; *Shaw v. Ford*, 7 Chy. D. at pp. 673-4. And see the cases cited under the heading "Limited Interest with Superadded Power or Restriction."

*Conditions in Terrorem.*—It does not appear to be definitely settled whether a condition against alienation or other restrictive condition can be enforced when the condition is merely in terrorem, that is, when it is not followed by a gift over which is to take effect upon breach thereof. If such a condition may be effectively imposed, its operation will be that upon a breach thereof the estate will revert to the grantor or testator, his heirs and assigns. If, on the other hand, the condition requires a gift over in order to render it effective, its operation will be that upon a breach thereof the estate will go as a remainder to the specified beneficiary.

Chief Justice Moss, delivering the judgment of the Court of Appeal, says:—"We have reason to believe that there was a common impression, after the decision by the Judicial Committee in *Renaud v. Tourangeau*, L. R. 2 P. C. 4, that such an attempt at restricting alienation, unless followed by a gift over, was ineffectual. The Court there thought that general principles of jurisprudence were opposed to the validity of a mere naked restriction on alienation" (f).

In *Renaud v. Tourangeau* there was a devise upon condition that the beneficiary should not in any manner incumber, affect, mortgage, sell, exchange, or otherwise alienate the estate devised until after twenty-one years from the testator's death, and this restraint was held to be void upon general principles of jurisprudence, and not by reason of anything peculiar to the laws of Lower Canada, from which Province the appeal was taken. The Judicial Committee adopted the judgment of Mr. Justice Meredith in the Court below, and the ground of his judgment was that a mere restraint upon alienation without any devise over should be treated as in terrorem and inoperative (g).

"Where there is merely a declaration that the widow shall not have the value of her annuity, that goes

(f) *Armstrong v. McAlpine*, 4 App. R. at p. 254.

(g) See L. R. 2 P. C. at pp. 11, 12, 15, 16.

for nothing; but in order to prevent her having the value there must be a gift over" (h).

"It is plain also that there being no gift over on alienation they are not bound by the restraints on alienation" (i).

"A proviso such as I find in this will expressed merely in terrorem, that is to say, without any gift over, is not allowed to take effect" (j).

Chancellor Boyd appears to consider that a middle course is open to the Court, namely, to treat the condition as effective for the purpose of preventing the devisee from alienating any estate greater than that which would pass by estoppel as against himself, but not to treat a breach of the condition as operating by way of forfeiture. He says:—"In the case in hand alienation inter vivos is restricted, but alienation by will is permitted. *The devisee may possess perfect freedom of enjoyment by leasing and the like during her life, but she cannot dispose of the remainder after her death except by testamentary instrument*" (k). There does not appear to be any authority in support of this middle course; all the authorities would appear to determine that a condition against alienation is (A) invalid (1) because it is repugnant to the estate given, or (2) because it is merely in terrorem, or (B) is effective (1) by reason of there being a gift over, or (2) by virtue of the forfeiture and reversion which come into operation upon any breach thereof.

Lord Chancellor Brougham says:—"If a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the interest of the legatee and create a new interest in another. In none of the cases bearing upon this subject (and they are very

(h) *Per* Malins, V.C., in *Roper v. Roper*, 3 Chy. D. at p. 721.

(i) *Per* Pearson, J., in *Re Spencer*, 30 Chy. D. at p. 185; and see *Hood v. Oglander*, 34 Beav. at p. 523.

(j) *Per* Kekewich, J., in *Re Mabbett*, (1891) 1 Ch. at p. 713.

(k) *Re Winstanley*, 6 Ont. R. at p. 320; and see *Dickson v. Dickson*, 6 Ont. R. 278.



numerous) can any warrant be found for the proposition that at law an inalienable estate can be created without any gift over. There is no gift over in the present case, which is that of a mere naked prohibition not guarded by any clause of forfeiture" (*l*).

Lord Chancellor Brougham said that the rule was the same whether the restraint upon alienation was attempted to be imposed upon realty or upon personalty (*m*).

It must be borne in mind that if the estate originally given is such that the condition is repugnant thereto, such condition will not be in any way fortified by annexing thereto a gift over.

Mr. Justice Kay says:—"It is clearly settled that a gift over upon an attempt to alien an absolute interest previously given is as void as a condition. This is shown by the cases of *Bradley v. Peixoto* (3 Ves. 324; 4 R. R. 7); *Ross v. Ross* (1 Jac. & W. 154; 20 R. R. 263); *Holmes v. Godson* (8 DeG. M. & G. 152), in which Lord Justice Turner stated that the law is the same both as to gifts of real and personal estate; and *Shaw v. Ford*" (*n*).

There are, however, cases in which it has been held that a condition in terrorem will be effective to work a forfeiture upon breach committed; thus in *Cooke v. Turner* (*o*), approved of by the Judicial Committee of the Privy Council in *Evanturel v. Evanturel* (*p*), it was held that a condition in a will, that if a devisee shall dispute the will, the disposition in his favour shall be revoked, is valid, and a breach thereof will cause a forfeiture, even though there be no devise over.

Probably the most flagrant departure from the current of the authorities upon the subject is to be found

(*l*) *Woodmeston v. Walker*, 2 Russ. & Myl. at p. 204.

(*m*) S. C. at p. 204.

(*n*) 7 Chy. D. 669, *per* Kay, J., in *Re Dugdale*, 38 Chy. D. at p. 180; and see p. 182, showing that all schemes and devices are equally ineffective to defeat a vested estate because of the owner thereof exercising his rights of ownership.

(*o*) 15 M. & W. 727.

(*p*) L. R. 6 P. C. at pp. 29, 30.

in the case of *Earls v. McAlpine* (q). There the testator had devised lands to his son with a direction in the will that the devisee "do not sell or transfer the said property without the written consent of my said wife during her life." There was no devise over in the event of the said direction being ignored. The said devisee mortgaged the property without the consent of his mother. The will was the same and the facts relating to the breach of the said direction were the same as those which had come before the same Court (differently constituted) in the case of *Armstrong v. McAlpine*, already referred to, and the Court held that the making of the mortgage operated to forfeit the estate taken by the devisee under the will, which estate thereupon devolved upon the heirs of the testator, and that the only interest acquired by the mortgagee was that which passed to him by virtue of the heirship of the mortgagor.

The cases cited by the Court indicate that the direction in the will as to sale or transfer (not being accompanied by a devise over in case of breach) did not operate as a condition, the breach of which would cause a forfeiture, but operated as a trust for the purpose of securing to any third person, if any, indicated in the will, any benefit which was intended to be secured to him by virtue of the said direction. There was no such third person indicated in the will in question, who would be in any way benefited by the devisee adhering to the direction as to alienation; but the Court cited the authorities which would lead them to the right, and then they went to the left (r). Mr. Justice Burton there said:—"There is no doubt that the tendency of modern decisions has been in all cases, where practicable, to construe what under the old law would be a devise upon condition as a devise in fee upon trust, and that by this construction, instead of the heir taking advantage of the condition, the cestui que trust could compel the observance of the trust by a suit in equity" (s).

(q) 6 App. R. 145.

(r) See 6 App. R. at pp. 153 et seq., and see p. 150.

(s) 6 App. R. at pp. 153 et seq., and see p. 150.

If a condition in *terrorem* be valid and effective, then the result of a breach will be a forfeiture to the heirs of the testator, or, in cases falling under the operation of certain provisions of the Devolution of Estates Act, to his personal representatives, and the persons entitled to the benefit of such forfeiture are able to make good title to a purchaser (ss).

*Condition Equivalent to Trust.*—It will be convenient for certain purposes for us to fall into line with the modern authorities, and to treat a grant or devise upon condition as being equivalent to a grant or devise upon trust, in all those cases in which there is no limitation over upon the breach of such condition, and not as being a common law condition a breach of which will lead to a forfeiture, for it will enable us to apply a test to assist in determining whether the condition in question is one which is capable of being enforced, or whether, being merely in *terrorem*, it is repugnant to the beneficial estate to which it is attached and therefore void. As a trust it can only be enforced when there is some person standing in the position of an independent cestui que trust for whose benefit the condition has been imposed.

As showing conditions which fail upon the application of this test we may refer to those cases in which property has been left in trust for an individual coupled with the most positive directions that he should not exercise the rights of ownership or have the dominion thereover until he should attain the age, say, of twenty-four years, or until he should marry. In all of these cases the condition fails, because there is no independent cestui que trust for whose benefit the condition has been imposed (t).

If this test had been applied to *Earls v. McAlpine*, it would have been found that the condition failed, for

(ss) See *Re Shanacy and Quinlan*, 28 Ont. R. 372.

(t) See *Curtis v. Lukin*, 5 Beav. at pp. 155-6; *Re Young's Settlement*, 18 Beav. 199; *Re Jacob's Will*, 29 Beav. 402; *Gosling v. Gosling*, Johns. 265; *Re Wrey*, *Stuart v. Wrey*, 3 Chy. D. 507; *Wharton v. Masterman*, (1895) A. C. 186.

there was no person standing in the position of an independent cestui que trust for whose benefit or protection the condition against alienation was imposed.

In the first place, let us see what is our authority for saying that conditions will, under the circumstances indicated, usually be treated as equivalent to trusts.

Chief Justice Cockburn says:—"We have the authority of Lord St. Leonards, the highest, perhaps, of the present day, for saying that the tendency in modern times has been to depart from the strict interpretation adopted in earlier periods of our law when these matters were considered only with reference to common law; and that where the language of the will and the intention of the testator admit of it, these devises 'upon condition' are to be considered as imposing a trust, and not as conditions which shall take the estate out of the devisee if he does not comply with them" (u). In the same case Crompton, J., quotes with approval from Sugden that, "What by the old law was deemed a devise upon condition would now, perhaps, in almost every case be construed a devise in fee upon trust," and that, "By this construction, *instead of the heir taking advantage of the condition broken, the cestui que trust can compel an observance of the trust by a suit in equity*," and he goes on to intimate that *when there is a limitation over upon breach of the condition, then such breach will destroy the estate which is subject to the condition* (v).

What we may call the Trust Test may be applied in this way:—If the grantee or devisee, instead of taking a legal estate with a condition against alienation, were made a cestui que trust (by reason of the words "upon condition" being read as equivalent to the words "upon trust") with an equitable estate like to the legal estate in quantum (because although the words "upon condition" would constitute him a trustee, they would also by reason of his being a beneficiary constitute him a

(u) Wright v. Wilkin, 2 B. & S. at p. 252.

(v) Wright v. Wilkin, 2 B. & S. at pp. 253-4; see also Attorney-General v. Wax Chandlers Co., L. R. 6 H. L. 1; Re Kirk, 21 Chy. D. at p. 437; Mulholland v. Merriam, 19 Gr. at p. 293; Re Robinson, Wright v. Tugwell, (1897) 1 Ch. 85.

cestui que trust), would the restrictive words which have been used with reference to the legal estate be operative to prevent him from alienating the equitable interest conferred upon him, if the same restrictive words be used in the same way with reference to that equitable estate?

In one sense this test is of no utility, for it is settled that the same rules as to repugnancy apply to an estate settled in trust for a beneficiary as in the case where the legal estate is conveyed to the beneficiary upon condition without any trust being created (*w*); but one cannot help feeling that if the question had been put in that way in connection with some of the determined cases (for example, *Earls v. McAlpine*), the answer to the question must have led the Court to a determination diametrically opposed to that at which they in fact arrived.

Let us illustrate by taking a case where property is left by will to trustees for the benefit of a particular person, and they are to have a discretion as to the manner of the application of the income arising therefrom, but no power to apply it otherwise than for the benefit of that person during his life, and there is no forfeiture or cesser clause, and no limitation over; the said income will pass to the assignees of that person under the Insolvent Act, notwithstanding a provision in the will that the beneficiary shall not have power to sell, mortgage or anticipate such income (*x*). If, on the other hand, a discretion is given to the trustees to apply the income for the benefit of several persons in such manner as the trustees shall deem most expedient, the assignee of any one of those persons is entitled only to such share as the trustees may choose to pay for the benefit of that person, and the trustees are not bound to pay anything at all for the benefit of any particular one of such persons (*y*).

A. H. MARSH.

(*w*) *Re Dugdale*, 38 Chy. D. 176; and see *Corbett v. Corbett*, 14 P. D. 7, and at p. 12.

(*x*) *Green v. Spicer*, 1 Russ. & Myl. 395; *Younghusband v. Gisborne*, 1 Coll. 400.

(*y*) *Re Coleman*, 39 Chy. D. 443.

## EDITORIAL REVIEW.

**Changes in the Judiciary.**

At the opening of the Court of Appeal on the 14th May, the Chief Justice and Mr. Justice Moss having previously taken the oaths of office, Mr. Irving, Q.C., Treasurer of the Law Society, asked leave to address the Court on behalf of the Bar with reference to the recent changes in the composition of the Court. In a very graceful speech he alluded to the long services and distinguished abilities of the Hon. John Hawkins Hagarty, the retired Chief Justice, who had been on the bench for forty-two years, during nineteen of which he had been a Chief Justice, and during thirteen Chief Justice of the Court of Appeal. He then referred to the judicial career of the present Chief Justice of twenty-three years upon the appellate bench, and his previous professional life of thirty-two years, and spoke of the affection and esteem in which he is held by the Bar, and to the high estimate of his ability and learning which is held by the profession. He then wished him long years of enjoyment of his new dignity.

He also alluded to the strength of the Court of Appeal and the great confidence felt in its decisions. In happy terms the learned Treasurer also extended the congratulations of the Bar to Mr. Justice Moss upon his accession to the Court, speaking of his long services as a Bencher of the Law Society, his popularity with the whole Bar, as evinced by the large vote invariably accorded to him at the elections of Benchers, and the affectionate regard and esteem of those who had been his associates at the Bar. He also spoke of the late Chief Justice Moss, whose memory and the fruits of whose learning are still with us.

The Chief Justice of Ontario then said:—"Mr. Irving and gentlemen of the Bar,—I need scarcely say that we heartily endorse the eulogistic remarks made by the Treasurer in reference to my eminent predecessor, and I could not usefully add anything to the well-deserved tribute of respect which he has so eloquently expressed. Speaking for myself, under any circumstances, I should have found it difficult to express in words my deep appreciation of this kind reception, but the too flattering

manner in which Mr. Irving has voiced your congratulations has almost overpowered me, and I must ask you to believe that my gratitude is deeper than I can at this moment give expression to. It is now within a few days of twenty-three years since I was raised to the bench, and, to use the words of a very eminent American on a recent occasion, I can only say "that I have earnestly striven to the best of my ability faithfully to fulfil my trust." Beyond that I have no claim to the honour conferred upon me. But it is a proud satisfaction to me to find that my efforts faithfully to discharge my duties have been noticed by the members of the profession of which I have been so many years a member, and to which I am so warmly attached. I am now nearing the close of my career, and there is nothing that I prize so highly as this manifestation of their esteem and goodwill. This Court has been presided over by men of great ability, including the gifted jurist whose place I am called upon to fill, and I feel the more on that account the grave responsibility of my position; but I think I am justified in saying that this Court has succeeded in gaining the confidence of the profession and of the public, and I do not doubt that, with the able assistance of my colleagues, with whom I have worked so long, we shall succeed in retaining that confidence—the more so as we have been reinforced by the addition of one of the ablest members of the Bar in the person of my friend, Mr. Moss, whose name is a household word, not only in this Court but throughout the Dominion, his brother having for all too short a time presided over its deliberations with an ability known to everyone. This assemblage has met for the purpose of doing honour to him, in which we cordially join, and I will not therefore detain you longer, but, thanking each and every one of you for this kind mark of your confidence, I will close by saying that I shall make every effort to retain it."

Mr. Justice Moss made a short address in reply to the Treasurer's words of appreciation. He referred in the warmest terms to the retiring Chief Justice and to the new Chief Justice, and then spoke of his own experience at the Bar, and his feeling of friendliness towards all his former associates. He thanked the Bar warmly for their manifestation of kind feeling towards him.

## BOOK REVIEWS.

*A Treatise on the Law Relating to Bankers and Banking Companies*, with an appendix containing the most important statutes in force relating thereto. By the late JAMES GRANT, Esq., of the Middle Temple, Barrister-at-law, author of "The Law of Corporations." Fifth edition. By CLAUDE C. M. PLUMPTRE, Esq., of the Middle Temple, Barrister-at-law, Middle Temple Common Law Student, Hilary Term, 1897. Assisted by J. K. MACKAY, Esq., of the Middle Temple and Western Circuit, Barrister-at-Law. London: Butterworth & Co. 1897.

A new edition of this standard work is always welcome, and the more so at this date, as some most important cases on banking law have recently been decided. In every respect the work maintains its high character.

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*Commentaries on the Laws of England*, in four books. By SIR WILLIAM BLACKSTONE, KNIGHT, one of the Justices of His Majesty's Court of Common Pleas, with notes selected from the editions of Archbold, etc. By WILLIAM DRAPER LEWIS, Ph.D., Dean of the Department of Law of the University of Pennsylvania. Book 2. Philadelphia: Rees, Welsh & Co. 1897.

The second volume of this book dealing with the Law of Property brings a wealth of notes. While many valuable notes illustrating the progress of the law are appended, it is to be regretted that the most modern are purely American. Perhaps the property laws of the United States, being affected largely by statute as well as highly technical in their nature, differ more from the original law than subjects of a less technical character, and for this reason we should have desired more modern English law. Taken in conjunction with the text, however, the notes form an excellent treatise on the growth of the law from the principles so clearly expounded by Blackstone.



# THE CANADIAN LAW TIMES.

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JULY, 1897.

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## THE RETIRING CHIEF JUSTICE OF ONTARIO.

A MEMORABLE event at Osgoode Hall was the large meeting of the Bench and Bar of Ontario which assembled on Saturday, the 12th June, to do honour to the Honourable John Hawkins Hagarty on the occasion of his retiring from the Bench.

Preparations had been made in the large hall of the Law Society by arranging the Judges' chairs in a semi-circle on the platform, providing special sitting accommodation immediately in front for the Benchers and their guests, while members of the Bar occupied the body of the hall. The gallery was filled with ladies, and their grateful display of colours afforded a pleasing contrast to the sombre black and white of the professional robes.

Amongst those who were invited by the Benchers were Rev. Dr. Scadding, Mr. Goldwin Smith, and Mr. Geo. F. Hagarty, a son of the Chief Justice, and Lt.-Col. Grasett, Dr. Grasett, Mr. A. W. Grasett, his nephews. Judge Jones of Brantford was also present, but the County Judges, being occupied with their Courts, found it necessary to send letters of regret. At eleven o'clock the Judges entered the hall in procession. They were preceded by the sheriffs of York and Toronto, the Master-in-Ordinary of the Supreme Court of Judicature, the Registrars of the Court of Appeal and the High Court, and the Marshal of Assize. Accompanying the Judges were the

retiring Chief Justice, Mr. Justice Gwynne, of the Supreme Court of Canada, in his state robes, and Sir Thomas Galt, late Chief Justice of the Common Pleas.

The Judges took their seats on the platform, Chief Justice Burton in the centre. On his right, the Chancellor of Ontario, Mr. Justice Maclellan, Mr. Justice Ferguson, and Mr. Justice MacMahon; on his left, Mr. Justice Osler, Mr. Justice Moss, Mr. Justice Rose. To their left sat Mr. Justice Gwynne, the retiring Chief Justice, and Sir Thomas Galt, exactly as they used to sit some years ago in the Court of Common Pleas. On the extreme right of the platform was the sheriff of York, and on the extreme left the sheriff of Toronto.

Following the Judges, the Benchers entered in procession, with the Treasurer of the Law Society and the Attorney-General of the Province at their head. Many Benchers had come to town specially for the occasion, amongst them Sir Charles Hibbert Tupper, Q.C.

The Treasurer opened the proceedings by addressing the Judges on behalf of the Benchers. He referred to the large and notable gatherings at Osgoode Hall, the first of which was in 1850, when the Bar of Upper Canada entertained those members of the Bar of Lower Canada who were here in discharge of their executive and legislative duties when the seat of Government was at Toronto. The learned Treasurer, after the merest reference to the Judges and other notable persons who were then present, took occasion to pass a eulogy upon Louis Papineau, whom he designated as "one of the greatest patriots in Canadian history." Why it should have been thought necessary to introduce politics at all, much less to revive old and buried political animosities on such an occasion, is past comprehension. Such references are sure to wound the susceptibilities of some one and to disturb harmony. As an introduction to his subsequent references to that admirable man, the present Premier of Canada, whom he designated the "political successor" of Papineau, it was quite unnecessary. The next occasion referred to by the Treasurer

was the tribute paid to Chief Justice Sir John Beverley Robinson upon his retirement from the Bench. The "gifted Henry Eccles, whose name was never spoken of except in tribute, then occupied the position which I now do," said the Treasurer, and "on that occasion Chief Justice Draper made a speech said to be one of the most graceful and appropriate that could be thought of."

The Treasurer unfortunately passed over without any reference the entertainment given to His Royal Highness the Prince of Wales, and specified as the next memorable occasion that on which the Bar received Her Royal Highness the Princess Louise and His Excellency the Marquis of Lorne, then Governor-General of Canada.

Resting there, he thought we could now look forward. The present was an occasion, he said, no less interesting than any which had gone before. He wished to remind the Bar of Ontario, and also desired to bring to the notice of their Lordships, that it was from the Bar of Upper Canada that one was trained, as we had all been trained, within the walls of Osgoode Hall, who was now proceeding to England to take his seat as one of Her Majesty's advisers, as one of the Judges in the Highest Court in the Empire—Sir Henry Strong, Chief Justice of Canada. That might be looked on as a great honour paid by the English nation to the Colonial Judges. It was a tribute that the Judges of this country had not been wanting in preserving the traditions of the English judiciary, that our Judges were the peers of any in the realm.

On behalf of the Benchers he also expressed their thanks for the presence of one of the members of the Supreme Court, Mr. Justice Gwynne, who had come here to aid in doing the honour that they desired to do. It was most interesting to note that he was now sitting with friends of sixty years' standing, his close friends of sixty years, with whom he struggled at the Bar, before whom he had pleaded, and with whom he had for many years sat on the same bench in another part of the building.

The Attorney-General of Ontario then read the address, which was magnificently illuminated and richly bound.

*To the Honourable John Hawkins Hagarty :—*

Sir,—Your retirement from the Bench after a service of upwards of forty-one years, for a third of which time you have presided over our highest Court of appellate jurisdiction, a Chief Justiceship held far longer by you than by any of your predecessors, is an event which, apart from the personal interest of those who have long enjoyed your friendship, the members of the Bar of Ontario deem to be an occasion of such public interest that they wish to give expression to the general admiration of the country for your eminent public services and individual merit.

We rejoice that our commemoration is celebrated in the presence of our assembled judiciary, and that this tribute and expression of respect and esteem is accepted by you within the walls of that hall which has been the scene of your life and labour. At an age which seems to be youthful you were called to a place among those of whom it may not be unfitting to take a brief retrospect, and in doing so to look back not only on the members of that judiciary with whom you became at first associated, but also on the many and important differences between the questions which, in the discharge of their high functions, they were called upon to consider, and those questions which have since arisen and the solution of which has largely taken place during your judicial career.

If the judiciary of your early manhood were limited in the area of the questions of law which they determined their names will ever be renowned in our judicial history for their talents and industry. Our records testify to their labours; affectionate remembrances still call for the words of esteem, and re-echo the satisfaction of former years, and, happily, among the community of this day there still remain those who can personally eulogize their memory.

In your early days the law of municipal corporations, largely the creation of statute, had not been reduced to a

settled system; the law of carriers was seldom raised; negligence arising by reason of railways was little known; contracts, mercantile and financial questions, involving vast sums based on wealth then unrealized, did not arise; company cases were rare; constitutional and controverted election law had not become the subjects of judicial consideration.

These have been among the large questions with which the judiciary of recent years, and conspicuously yourself, have been concerned, and with such success has their work been accomplished that the confidence and pride of this country are based on the conviction that our judiciary still, as of old, maintains its character for learning, integrity and justice.

The administration of justice depends upon the purity of our Judges, and by you throughout a long public career the dignity of the noble profession to which we all belong has been constantly upheld.

Our cordial and sincere wishes are offered for your enjoyment of life, free from the toils and anxieties of the judicial station upon which you have for so long a period cast special lustre.

(Signed) A. S. HARDY, *Attorney-General.*

ÆMILIUS IRVING,

*Treasurer of the Law Society of Upper Canada.*

Osgoode Hall, 12th June, 1897.

The Attorney-General added that he had been requested also, on behalf of the Government of the Province, to say one word expressive of its satisfaction that since Confederation Mr. Hagarty had been one of the chief ornaments of the Bench. Many changes had taken place in his time; the Common Law Procedure Act was passed, the Administration of Justice Act had to be administered, and the Judicature Act changed entirely the procedure of the Courts. The Government had always, in the last twenty years, been inspired with the greatest confidence that the changes called for in this Province by the changes in the

law of the mother country, and the other countries of Europe, would receive from the retiring Chief Justice and the other members of the Courts that consideration which their merits and importance demanded. The Government fully shared in the expressions of the address. In the long line of men who had held the position of Chief Justice, eminent and illustrious as they were, not one of them would more illumine the pages of the history of law in the Province than Mr. Hagarty's own career. On behalf of the Government he desired to join in the expressions, the hearty expressions, of hope that he might be long spared to enjoy life, and that in retiring full of honours and full of years, the rest of his life may be, as it had been in the past, a pattern for every good man in this country.

The retiring Chief Justice replied to this address as follows :—

*“ Mr. Attorney-General and Gentlemen of the Ontario Bar :—*

I receive with feelings of deep satisfaction and pleasure the kindly and flattering address with which you have honoured me, emanating as it does from those with whom I have been so long and intimately connected. Fifty-seven years have passed since I became a member of your goodly company. There are some in its ranks of fair promise who were born since I ascended the Bench ; but few, indeed, who started with me in the race of life, whom I knew and valued in their strength of youth and hope, remain to tell of those early days. They have passed before us into the silent land. A long extending vista opens to our gaze as we realize the fact that nineteen of our Judges with whom I sat as a brother have passed from life since I joined their band. A procession of honoured figures seems to pass before us headed by the gracious presence of such cherished names as Robinson, Macaulay, Blake, Draper and others, held in grateful remembrance by all to whom the best traditions of legal worth and learning are dear. No member of the present Bench of Ontario assumed office for

eighteen years after my appointment, when my very worthy friend and successor, the present Chief Justice, became a Judge in Appeal. I feel myself the last remaining link between the old array of high judicial worth and our existing administrators of the law whom I was till lately proud to call my learned brothers. You naturally and rightly invite attention to the vast expansion of our legal system and of the larger interests now in litigation, compared with the early days to which I have referred. A wider field is now opened for legal decision, involving principles of constitutional, commercial and financial law, arising from the changes in our political system and the vast development of municipal institutions, railroad and public companies. It is grateful to me to hear your expressed opinion that the judiciary have dealt with the larger questions coming before them, consequent on the upward progress of their country, with judgment and ability, to the satisfaction and confidence of the community.

I, who have seen all the phases of change, amendment and expansion, can bear witness to the efforts constantly and successfully made to administer the law as the Legislature, from time to time, provided. I was for years conversant with the old system first fatally assailed by what may be called the great reform bill, the admirable Common Law Procedure Act. I have combated in those pleasant pastures where that picturesque, but now extinct, animal, the Special Demurrer, flourished luxuriantly, and those long-deceased offspring of legal imagination, John Doe and Richard Roe, fought their battles over all the disputed possessions of the Province. They have all passed away without much lament. But it is only fair to say that the old system of precisely framed pleadings and issues had most salutary effects on the careful preparation of a case for trial, and the greater certainty in its hearing and decision. Much has been wisely and excellently done to abolish useless form and fiction, but I fear that the result has, unfortunately, not greatly tended to diminish the cost of litigation. But all such views may now be

regarded as the prejudices of an old-fashioned "laudator temporis acti," who must not be allowed to maunder longer over the days of old.

It is a momentous event in an old man's life, when his connection with a profession followed with engrossing attention through all his long years of service is finally severed. But his retrospect may be lighted up by pleasant memories, and his remnant of life be cheered by unbroken personal friendships and the sympathies of faithful friends. It has been well said in a pleasant old rhyme that for such as I there remains but

' A valley to cross, a river to ford,  
A clasp of the hand, and a parting word,  
And a sigh for the vanished past.'

Till my time comes to cross the valley of the shadow and to ford the dark river, my most cherished memory will be the kindly clasps of the hand and the still more kindly words that have greeted me to-day. My warmest wish will ever be that all present and future occupants of the Bench of Ontario may enjoy, as fully as I have enjoyed, the kindness, courtesy and respect extended to me through my long-protracted judicial life."

Chief Justice Burton then rose and said :—

" With your kind permission, Mr. Treasurer, I should like to add, on the part of the Bench, one tribute to the testimony the Attorney-General has given on the part of the Bar, to the strong, sound sense, learning and ability—to which I might add kindness and cordiality—which the eminent Judge whom they are delighted to honour has invariably displayed for the lengthened period he has adorned the Bench, on which we have had the honour of sitting as his colleagues.

I wish it had fallen to some one more capable of expressing their opinions than myself; but perhaps there is a fitness in my being called upon to perform the pleasing duty, as I am a sort of connecting link between the old generation of Judges—two of whom I am pleased to see



now—and the new, as it may surprise some to learn that I am the only Judge now on the Ontario Bench of those who were on it when I was appointed.

The learned Chief Justice retires now full of years and honours, and I may perhaps be permitted to suggest to him that he might yet greatly add to his usefulness were he to collect some of the amusing reminiscences connected with the Bench and the Bar, which with his long experience, he must have, and which he is so peculiarly qualified to present in a palatable form to the public.

A little incident to which I am about to refer is not one altogether calculated to raise the reputation of the Bar with strangers; but when I say that it occurred more than half a century ago, it will be seen that no great injury is likely to be done to the refined body of able men who constitute our Bar to-day; still I would not urge the Chief Justice to include the anecdote in his forthcoming volume. I heard it told by Sir John Beverley Robinson, and it discloses a very primitive state of things. The scene of the incident was in the village of Hamilton. In those days there was no Court House there, and the Assizes were held in a school house in Barton, upon what envious people in Toronto call the mountain. On the second day of the Court a lawyer of the name of Tenbrooke, who, I presume, had not registered as a total abstainer, rushed into the Court and moved the learned Judge to have the door locked and all the inmates of the room searched for his watch, which had been stolen; but before the Judge could pronounce upon the motion a well-known tavern-keeper of the name of Terryberry interposed with, 'Lord bless you, Mr. Tenbrooke, don't you remember handing it to me when you went to sleep yesterday in the field?' Sir John Robinson, from whom I heard the story, was the Judge.

I often regretted that the late Chief Justice Draper had not published his reminiscences, which would have been invaluable, but let me hope that my present suggestion may bear fruit.

I entertain, as do all my learned brethren, the deepest sympathy with the eloquent and feeling remarks of the Attorney-General, and will not detract from them by any further words of my own."

In response to the very evident desire of the Bar, Mr. Justice Gwynne rose and expressed briefly the pleasure which it afforded him to accept the invitation to be present. It was to him a renewal of the early days when he sat in the Court of Common Pleas with his leader and brother, Mr. Hagarty, and his other friend, Sir Thomas Galt. He was, the learned Judge said, with a merry twinkle and smile, grateful to the Benchers for having called him, as it were, out of exile into a renewal of his youth.

Sir Thomas Galt was also forced to rise and thank the Bar for their kindly feelings towards him, and to say that it afforded him much pleasure to be amongst his old friends.

The many friends of the retiring Chief Justice are gratified to find his name amongst the recipients of Jubilee honours.

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## CONTRA PROFERENTEM.

It is an ancient maxim of law in the interpretation of deeds that *verba chartarum fortius accipiuntur contra proferentem*; or, *quælibet concessio fortissime contra donatorem interpretandum est*. Like all maxims, these are elliptical, assume a vast amount of learning and reasoning, and themselves require interpretation. Perhaps the clearest and truest exposition of the rule is that given in Elphinstone on Deeds (a), where it is said, "This rule is often misunderstood. It does not mean that the words are to be twisted out of their proper meanings, but only that where the words may properly bear two meanings, and where, after we have applied evidence, whether extrinsic or intrinsic, admissible under the foregoing rules, we are still unable to determine in which of these meanings they were used, we must take them in the meaning most disadvantageous to the person who uses them, unless the adoption of that meaning would work wrong."

The authority of the rule has been much shaken by a dictum of Sir George Jessel's in *Taylor v. Corporation of St. Helen's* (b), where his Lordship said, "I do not see how, according to the now established rules of construction, as settled by the House of Lords, in the well-known case of *Grey v. Pearson* (c), followed by *Roddy v. Fitzgerald* (d), and *Abbott v. Middleton* (e), that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the

(a) Rule 21.

(b) 6 Ch. D. 270.

(c) 6 H. L. C. 61.

(d) 6 H. L. C. 823.

(e) 7 H. L. C. 68.

maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled." It is our present purpose to examine this dictum and the proposition it lays down, and ascertain how far it is justified by the cases upon which it purports to rest, the principles of the dictum itself, the result of its application, and how far it is a workable rule. We know of no case in which the maxim, being strictly applicable, has been rejected on account of this dictum, but it is so frequently cited as authority for its rejection that we hope the enquiry will not be without benefit.

In the first place, as it professes to rest upon the authority of the House of Lords, it is well to examine the cases decided by the House in order to see whether that august body gave any indication of an intention to reverse or abrogate such an important, and to all appearances, necessary maxim.

The three cases cited by the Master of the Rolls were all cases for the interpretation of wills; and, as the maxim never was, and never could be, applied to the interpretation of a will, the first thought that arises is that the House of Lords never had the maxim in mind at all, and therefore never could have intended to abrogate it. The principle underlying the maxim is, that after a man has made a deed he shall not derogate from it by interpreting ambiguous words in his own favour, so as to enable him to retain part of the subject matter of the grant rather than be deprived of it by interpreting the words against him—a principle entirely out of place in the interpretation of wills, and the statement of which, if correctly stated, ought to dispose of the matter. The second thought is, that in dealing with the interpretation of wills, a dictum respecting the interpretation of deeds would necessarily be obiter dictum, unless the canon of interpretation under discussion was common in its application to both kinds of

documents. But it has been said that, "if there is any difference between a deed and a will in cases where the instrument admits of two constructions, the deed is to be taken the more strongly against the grantor" (*f*). Nothing is to be found in any of the three cases cited expressly referring to the maxim, which is peculiar in its application to deeds as distinguished from wills, and it therefore becomes necessary to examine the cases further and ascertain whether, by necessary inference, anything is laid down which is so inconsistent with the application of the maxim to deeds that the House would be precluded hereafter from applying it if the appropriate case should arise.

In *Grey v. Pearson*, the question was as to the meaning of the phrase "die under twenty-one and without issue," as affected by the context. The following are the only general rules referred to:—Per the Lord Chancellor, at p. 78, "Adhere as rigidly as possible to the express words that are found, whether in wills or in deeds, and give to these words their natural ordinary meaning, unless, by so doing it appears from the context, that you are using them in a different sense from that in which the testator or the maker of the deed intended to use them, or unless, by so using them, you would be doing something which would manifestly lead to an inconsistency," etc. To the same effect Lord Ellenborough is quoted, at p. 85. Per Lord St. Leonards, at p. 91, "Words should be received in their natural grammatical import, and effect given, if possible, to every word in the will." Repeated at p. 99, with the addition that if by so doing the intention is defeated, the rule is to give the words such a natural construction as will effectuate, and not defeat, the intention. Per Lord Wensleydale, at p. 106, in construing "all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument," etc. So far there is not a hint at

(*f*) Per Lord Abinger, C. B., *Stephens v. Frost*, 2 Y. & C. Ex. at p. 309.

anything like the maxim, the sole proposition being to find the intention, first, by taking the ordinary meaning of the words; but, secondly, if that produces inconsistency or absurdity, or manifestly defeats the otherwise evident intention, by adopting some other natural meaning. The idea of ambiguity, in the sense that the words exactly consist with two diverse and irreconcilable meanings, is entirely absent.

In *Roddy v. Fitzgerald*, the question was whether "issue" meant "heirs of the body" or "children." The opinion of the Judges was taken, and Baron Watson said, at p. 843, "From the use or misuse of legal terms, it frequently happens that an apparent intention cannot be given effect to according to the rules of law affecting the limitation of estates. And again, words are capable of being construed in two senses. It is for the Court to say in what sense the testator's intention would be best fulfilled." He then goes on to refer to the rule as to general and particular intent. It is noticeable here, that there is a distinct reference to words capable of being construed in two senses, but not the slightest reference is made to the maxim. Indeed, one cannot for a moment imagine the application of the maxim in a case in which a testator has used ambiguous language. There is nothing further in the judgments in this case, except that the House and the Judges gave expression to the truism, that the duty of a Court is to find out the intention of the testator.

In *Abbott v. Middleton*, the question was as to the meaning of the words and phrases "but," "dying," "without issue." Lord Wensleydale, at p. 114, repeated the rule as to reading words in their ordinary grammatical sense; and, at p. 116, he pointed out that this involved no inconsistency or repugnance in any part of the will. There is nothing else that can be quoted from this case which in any way bears upon general rules of interpretation.

It appears, therefore, that there is nothing in the House of Lords cases which is new, for, in the first place, it is a

truism to say that the Court endeavours to find out the intention of the maker of the instrument, whether deed or will ; and, in the second place, it is not new that in the process of interpretation words are to be taken in their ordinary grammatical sense unless the result is to produce repugnancy or inconsistency with the rest of the will, or to defeat an intention otherwise manifest. Remarks are sometimes made at the present time touching upon the duty of the Courts in every case to ascertain the real intention of the maker of the instrument, as if that had not been the course of procedure in ancient times. And indeed Sir George Jessel's dictum itself may be so read as to bear a reproachful meaning.

Let us now examine the dictum on its own merits. After stating that the maxim cannot be considered as having any force at the present day, his Lordship proceeds to say, "The rule is to find out the meaning of the instrument." Pausing there, is there anything in that principle that is new, or inconsistent with previous decisions ? Have not the Courts always endeavoured to find out the meaning of the instrument ? But in many cases the Court feels bound, for the security of titles which depend upon particular use of language, sometimes to find a meaning which they regretfully say is not the actual meaning of the testator though it is plainly his expressed meaning. Indeed in *Abbott v. Middleton*, Lord Wensleydale quotes from *Fearne* (p. 173), "that it is better that the intentions of twenty testators every week should fail of effect than that the rules should be departed from; upon which the security of titles and the general enjoyment of property so essentially depend" (g). Again, the House of Lords, in *Smith v. Cooke* (h), protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey, by some sort of preconceived idea of what the parties would, or might, or perhaps ought

(g) 7 H. L. C. at p. 114.

(h) L. R. [1891] A. C. 297.

to have intended when they began to frame their instrument (i). Now, if the House of Lords had intended to lay down the rule that the apparent or conjectural intention should prevail over the expressed intention, or that the intention generally should prevail, Lord Wensleydale would not have quoted and followed the passage from *Fearne*; nor would the House subsequently have so rigidly adhered to the principle of leaving conjecture, however probable, to the winds, and adhering strictly to the sense of the language. The opportunity was presented in *Abbott v. Middleton* of refusing to defeat the testator's intention by a rigid adherence to the words regardless of consequence, but it was not embraced. We are, therefore, unable to see anything new in Sir George Jessel's assertion, that the rule is to find out the meaning of the instrument. In fact, it requires qualification in the sense that the testator may defeat his own intention by the use of inappropriate language.

He goes on, however, to say that that is to be done "according to the ordinary and proper rules of construction." What are the ordinary and proper rules of construction? For wills and for deeds they are entirely different. A set of rules for the interpretation of wills would do us little good in interpreting deeds—and vice versa. And it is neither expressed in, nor can it be inferred from, the language of the Lords in the three cases, that the rules for the interpretation of deeds were thenceforth to be varied. The Master of the Rolls' qualification adds nothing to the aphorism. Presumably, when an instrument is up for interpretation, there is something obscure, doubtful or ambiguous in it, and rules of construction have, of necessity, to be applied. But again, what are the ordinary and proper rules of construction? No doubt, the qualification is pregnant with the denial that the maxim under consideration is proper. But, adopting the rule so often referred to in the House of Lords cases, that

(i) See also, and compare *Carroll v. Provincial Nat. Gas Co.*, 26 S. C. R. 181.



the words are to be used in their ordinary and grammatical sense, does that show that the maxim is not a proper one? There are obviously cases in which the adherence to the ordinary grammatical use of language will not solve the difficulty. Indeed, even the rule referred to is qualified, because the ordinary use of the words may produce an absurdity, an inconsistency, or a repugnancy, as pointed out by all the Lords. Then it is not a final rule. It is only a help by the way. It was not found sufficient in *Taylor v. Corporation of St. Helen's*, for a good deal of technical knowledge was displayed by the Master of the Rolls in ascertaining what passed by a grant of the "watercourses, dams, reservoirs," etc.

His Lordship goes on to say, "If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty." Now, if we can instance a case in which, by taking the ordinary and grammatical sense of the words used, and giving to technical words their technical meaning, we still find an ambiguity, are we to adopt the dictum, reject the maxim, and say the grant is void for uncertainty? Or are we to apply the maxim, as one of the "ordinary and proper rules of construction," and make the grant effectual rather than allow it to perish? The rule itself implies that all other reasonable means of finding out the meaning have been resorted to, and yet an ambiguity remains. To adopt the dictum would be to abrogate also the maxims that a man shall not derogate from his own grant, and that a deed should be maintained rather than perish. The ordinary and simplest instance of the application of the maxim is that given by Blackstone (*j*), citing from Coke, "also such a grant at large, or a grant for a term of life generally, shall be construed to be an estate for the life of the grantee; in case the grantor hath authority to make such a grant; for an estate for a man's own life is more beneficial and of a higher nature than for any other

(*j*) 2 Comm. 121. The rule is now altered by R. S. O. cap. 100, sec. 4, sub-sec. 3, in the case of a grant at large.

life, and the rule of law is that all grants are to be taken most strongly against the grantor unless in the case of the king." Now in this case, giving due effect to all the words, we arrive at nothing more than that an estate for life is to pass. But there are several kinds of life estates—an estate for the life of the grantor, or for that of the grantee, or for that of a third person. As no *cestui que vie* is mentioned, we dismiss that. But the grant is still ambiguous. Is it to be for the life of the grantor or for that of the grantee? Will the ordinary and grammatical sense of the words lead us to the truth? Have we exhausted all the ordinary and proper rules of interpretation? And are we to hold the grant void for uncertainty, and so interpret it in favour of the grantor? Is the deed to perish? Clearly not. Then, is the grantor to be allowed to belittle, or derogate from, his grant, and under ambiguous language to claim that it is less than the grantee would have by his interpretation? Or, is he to be entitled to say that, as it is uncertain it must be void, and the land revert to him? If we take the grant most strongly against the grantor, then, in Blackstone's words (*k*), "hereby all manner of deceit in any grant is avoided, for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them."

If Blackstone's rule, cited from Coke, is correct, then we have a case in which no rule of construction other than the maxim in question will avail to give an accurate meaning to the deed. Put the dictum of Sir George Jessel alongside of Mr. Elphinstone's explanation of the maxim, and we shall see that no other maxim will act as a guide to a solution. It is after every device has been resorted to, and done nothing more than leave us with a word or words having "properly two meanings," that the maxim is to be resorted to; and when one of those proper meanings is for and the other is against the grantor, then the maxim becomes applicable, and the deed is taken

(*k*) 2 Comm. 380.

“most strongly against,” that is, in that one of the two proper meanings of the words which is least favourable to the grantor.

Any other course would be one of very dangerous policy. The only course suggested by the Master of the Rolls is to hold the deed void. This is favouring the grantor with a vengeance. Suppose in the case of a grant of an estate for life generally, the Court should say that as the words in their proper use are uncertain, the grantee shall take nothing; what a premium upon that deceit of which Blackstone speaks! Why not say, the deed shall not perish at any rate, and the grantee shall take as much as he justly can? We feel bold enough to say that if a Court could find its way to giving anything by an ambiguous deed, it would do so rather than hold it void. But, to give the least it could, would only be to favour the person who used the ambiguous language as much as possible without rescinding the whole transaction. It would be a matter only of degree and not principle.

It merely remains to say that the maxim itself is not founded upon anything peculiar to deeds, but upon that principle of self-interest which makes men careful not to go beyond their own interests in the use of language, and upon the policy that a man shall not be allowed to deceive by the use of ambiguous language. So we find that in pleading, when that was of importance, a pleading, if susceptible of two meanings, one for and one against the pleader, was always taken in the meaning more strongly against the pleader.

And in construing conditions of sale, the same principle has been so long, so consistently, and so justly applied against the vendor, that it would astonish one to hear that it has been improperly used.

It is difficult, indeed, to conceive that there was any intention in the House of Lords of in any way interfering with a most wholesome principle, and certainly it is difficult to find either the intention or the justice of such an intention, even with the aid of Sir George Jessel's dictum.

## EDITORIAL REVIEW.

### **The Queen's Diamond Jubilee.**

The display made in the streets of London on the 22nd June, in honour of Her Majesty's peaceful rule of sixty years, is one, the like of which never before was witnessed in the world, and one which could not be produced by any other nation save the British. While military display always has been, and probably always will be, a feature of such pageants, the display of troops itself tended to emphasize that the whole procession was the representation of a state of law and order which has more nearly reached perfection than under any system yet discovered.

Wherever British arms have been successful the blessings of constitutional government, even-handed justice, and peaceful commerce have followed. A more striking illustration of the success of British rule and the confidence reposed in it could not be afforded than that of the picturesque and noble Indian army, self-defenders and defenders of the Empire, or of savage tribes, till lately wild and ungoverned, transformed into police and contributing to the maintenance of law and order. No other nation has made use of the same means of progress and civilization, nor has any other taught the natives of their colonies that they may be the means of furthering the civilization brought amongst them. Amongst all the glorious traditions of British arms and British government, there is none that should give us greater reason for pride than the fact that British rule has taught the natives of India and Africa that it has confidence in their own abilities, and will trust them to aid in maintaining order and administering justice.

But the magnificent assembly of colonial prime ministers is of still greater significance. No other nation boasts

either such possessions, or such mild and beneficent, and yet firm and well administered self-rule. They are the exponents of constitutional, popular, responsible self-government; as parliamentary representatives, they are the men of the people, who have come from amongst the people; as ministers and advisers of the Crown, they are the link between the people and that Sovereign whose mild, just, beneficent and splendid reign has contributed more to the peace and happiness of the world, to the furtherance of justice and to the evolution of a nearly perfect system of constitutional government, than any other known to history. Canada in the lead, as the first of the federated dominions of the Crown, is but a prototype of federations of other colonies to come, to culminate, doubtless, in an actual constitutional federation of the Empire, built upon an actual sentimental federation, the reality and strength of which was not rightly discerned before now.

But the fact of greatest significance was that Her Majesty, with but a formal escort, drove through the streets of the capital amongst tens of thousands of her subjects, without fear, because without reason for fear, but with every reason for receiving those grateful, loyal and fervid expressions of love, veneration and admiration which greeted her on every side.

#### **Jubilee Honours.**

Amongst the very few honours conferred by the Queen on the occasion of the Jubilee, it is gratifying to find that the retiring Chief Justice of Ontario becomes Sir John Hagarty, Chief Justice Tait, of Montreal, Sir M. M. Tait, the Chief Justice of Manitoba, Sir Thomas Taylor.

It has been sometimes remarked that the lowest order of knighthood is conferred on Judges, while the highest honours are conferred upon many people whose attainments and services are of a lower order than those of the judiciary. It must be borne in mind, however, that long usage under English practice renders almost sacred the custom; and that the honour of knighthood is conferred upon

Judges as a matter of course in England, and almost as a matter of course in the Colonies. Many of the orders are modern and were established for special services, while the ancient custom of making the Judges Knights Bachelor has remained unaffected. It is as much an honour, viewed in this light, as the commission itself, and in any view of the matter is a courteous recognition of merit which cannot but be and, with rare exceptions, is courteously received.

**Mr. Justice Moss to the Bar.**

We regret that we were not in possession of the notes of Mr. Justice Moss' address to the Bar on the occasion of their congratulations to the new Chief Justice of Ontario and himself. We are happy now, however, to present the address :

*"Mr. Treasurer and Gentlemen of the Bar:*

Before acknowledging the remarks you have been good enough to make with reference to myself, permit me to add a few words to what has been so felicitously expressed by the Chief Justice.

I listened with much interest to the references that have been made to the eminent Judge who, until quite recently, was the head of this Court and the Chief Justice of Ontario. He has been for so many years a central figure in our Courts and has borne so conspicuous a part in the administration of justice in this Province that it is difficult to realize that the time has at length come when the country is no longer to have the benefit of his great ability and learning and that we shall see him no more in his accustomed seat in this Court. Many a man present here to-day can doubtless recall, as an event happening in his boyhood, or early manhood, the elevation of Mr. Hagarty to the Judicial Bench. Since that time many who frequented, or practised in, the Courts have passed away, and a new generation of lawyers has sprung up. But among the new generations, as among his remaining

contemporaries, there exists a universal feeling of profound admiration, respect and esteem for the cultured scholar, the able lawyer and the distinguished Judge who has so deeply impressed his strong personality upon the jurisprudence of the Province.

While we must regret that the country can no longer claim his services, we can all unite in the wish that in his retirement he may be spared to spend many happy days in the enjoyment of his well-earned repose.

It gave me much pleasure to hear what was said of our present Chief Justice. Of him and of his work as a Judge and of his qualities as a man I shall not to-day, standing in his presence, presume to speak. I will only say that coming, as I do, immediately from the Bar, I have had ample opportunity of learning the feelings and sentiments of its members with regard to his promotion, and I know that it has been received by all with the greatest pleasure and satisfaction. And I feel assured that I can truly say that the Chief Justice comes to his new dignity accompanied by the cordial good wishes of the Bar, which are heartily echoed by his brethren of the Bench.

I thank you, sir, most sincerely for the kindly references to myself, which, speaking for yourself and the other members of the Bar, you have been good enough to make. During the years to which you have alluded, in which I have been associated with my professional brethren in the practice of my profession, it has been my good fortune to have been the recipient of many proofs of their confidence in and kindly regard for me. And what has been said here to-day by you on their behalf but adds one more obligation to the many I am under to them and which I take this opportunity to acknowledge and to tender my grateful thanks for.

In the course of a somewhat long and varied practice it has been my fortune to meet many of my brethren of the Bar in hard-fought contests, in the heat of which hard knocks were given and taken on both sides. But no bitterness or ill-will resulted, I am happy to believe. And

I can in all sincerity say that in leaving the arena of practice I carry with me none but the pleasantest recollections of my experiences among my professional brethren and of the many happy days, both in Court and out of Court, I have spent in their society.

I esteem it a great honour and privilege to have been selected for so important a position in the public service, and to be associated therein with the able, learned and honourable men who now occupy this Bench.

As you, sir, have happily remarked, under their predecessors and themselves, this Court has attained a judicial eminence both here and abroad of which the country may justly be proud.

I venture to express the trust that while I continue a member of the Court I may never do anything which might tend to tarnish its bright record or to cause you to regret or wish to retract any of the kind words you have spoken to-day."

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# THE CANADIAN LAW TIMES.

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AUGUST, 1897.

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## ONTARIO LEGISLATION, 1897.

**A** VERY small but important personage known to the writer, who watches with great eagerness such of the conversation of his elders as he is allowed to hear, demands to have explained to him the meaning of each new word and phrase. If the explanation is not given, and the word or phrase is repeated, he remarks, "There you go again! What do you mean by that?" That represents correctly enough the feeling that one experiences when he takes up the annual statute book. It is true that an Interpretation Act has been passed this last session, but there is no clue to its own meaning. Some of the sections, such as the fourth and fifth, remind one, more than anything else, of one of those dreams in which some impossible thing has to be done and can't be done, and the dreamer goes about doing it, but does not do it, and accepts his fate fatefully. They are, like the dream, quite new to us, yet with a familiar appearance, as if they had been seen somewhere before; they don't suggest anything as to what they mean, and yet they seem to be quite clear, and, taken altogether, they are decidedly a puzzle. The sixth section, however, will furnish a good excuse for a Court to decide according to ordinary common sense, although itself not very happily worded. We presume that the intention of the present enactment was to make any reference to an amended Act mean the Act as amended. But the question here

arises, whether a reference in the amending Act itself to the Act amended will be within the new enactment. It runs, "Whenever any Act or part of an Act is repealed, and other provisions are substituted by way of amendment, revision or consolidation, any reference in any unrepealed Act . . . to such repealed Act or enactment, shall . . . be held and construed to be a reference to the provisions of the substituted Act, etc." Is the reference in the amending Act itself a reference "in any unrepealed Act . . . to such repealed Act?"

The following section, 7, makes an amendment take effect from the date of the amendment, though it may contain a reference to "the commencement of this Act," which might mean the original Act amended. As an instance of its application, the Succession Duty Act, 1892, was amended by repealing section 4 and substituting a new section 4 therefor: 59 Vict. cap. 5, sec. 4. In sub-section (c) reference is made to "any person dying after the commencement of this Act." This will mean now the amending Act. Probably, the same result would have been arrived at on general principles.

By the next four sections the Legislature has emphatically declared that no significance is to be attached to anything it may do in the way of repealing or amending statutes. The repeal of an Act is not to be deemed to involve a declaration that the repealed Act was in force when repealed; the amendment of an Act is not to be deemed to involve a declaration that the law was before the amendment different from what it may be under the amendment; the repeal or amendment of an Act is not to be deemed to involve any declaration whatever as to the previous state of the law; and the re-enactment of an Act is not to be deemed an adoption of its construction as judicially declared. This, from a legislative body, is curious enough, but from a legislative body which has declared that it is not competent for the High Court to depart from a prior known decision of a Court of co-ordinate jurisdiction, which of course includes the interpretation of statutes, it is grimly, cynically, humorous. There is only one more hedge wanted, and that is an enactment that no Act hereafter passed shall be deemed

to involve a declaration that it has any meaning, which is only a necessary adjunct to these sections.

By chapter 13, another attempt is made to get business out of the tangle into which it was thrown by the limitation of the right of appeal. The natural result of the legislation was, as we have before pointed out, to heap up appeals in the Court of Appeal to such an extent that the Court could not overtake its business. Now the Court is to be enlarged by the addition of a Judge, and power is given to call in one or two Judges from the High Court, in order to enable the Court to sit in two divisions. On its face this is no remedy. Making the Court consist of five Judges instead of four will not enable it to hear cases any more rapidly than it does now. It must sit in two divisions in order to make greater speed. As the Court sits almost continuously, adjourning only to prepare judgments, this will mean that in order to make anything like satisfactory progress, one or two Judges from the High Court must sit continuously in the Court of Appeal. But the High Court cannot suffer this depletion of its numbers. Thus speed must be made at the expense of High Court business, or not at all. To provide, practically, for delay in appeals instead of allowing them to be sifted out in the Courts below is not a satisfactory result.

By the wording of sec. 2, clause (2), it appears that no appeal from a Divisional Court of the High Court can be heard in the Court of Appeal except before the full Court of five Judges of the Court of Appeal proper. The phrase "the full Court of five Judges," standing where it does cannot, of itself, mean anything but the full Court of Appeal proper. No Divisional Court of Appeal could be so constituted as to hear such an appeal, even if this phrase were open to such an interpretation. By the 4th section no more than two High Court Judges can be selected to sit in the Court of Appeal, and this, "to enable two Divisional Courts of the Court of Appeal to be held;" and two Justices of Appeal at least are to sit in each Divisional Court of the Court of Appeal. Thus, for the purpose of making up Divisional Courts, seven

Judges are to be divided into two Courts of four and three each. While Divisional Courts of the Court of Appeal are sitting, then, no appeal from a Divisional Court of the High Court can be heard. As the purpose of drafting Judges from the High Court is to make up Divisional Courts of the Court of Appeal, and not in order to make up a full Court of five Judges, the intention seems reasonably clear that only the Court of Appeal proper can hear an appeal from a Divisional Court of the High Court. That being so, the Court, as at present constituted, cannot hear such an appeal. The Dominion Statute providing for the payment of the Judges was not amended last session, and it is said that no appropriation was made by Parliament for the new Justice of Appeal. Consequently, all appeals from Divisional Courts are in suspense for a year; unless, indeed, some one can be found to work for nothing for a year, or the Governor-General should be advised to exercise one of the prerogatives of an unlimited monarch and make a forced loan from "Contingencies."

Chapters 14 and 15 inclose "a great multitude of fishes." They make too many amendments of too various a character to review at length. The pending revision of the statutes having disclosed several hundred required amendments not heretofore noticed, these two chapters deal with them. The first amendment is a repetition of the enactment (if it can so be called) which affected to limit the right of appeal to the Supreme Court. The former enactment was distinctly held to be ultra vires by the Supreme Court (*a*). The right of the Supreme Court to hear appeals being, according to that decision, entirely beyond the jurisdiction of Provincial Legislatures, it is difficult to see why an attempt to re-enact it should have been made.

The previous Act affected to apply directly to the Supreme Court. It read, "No appeal shall lie to the Supreme Court of Canada." The present enactment affects to deal directly with the Court of Appeal. It reads, "The judgment of the Court of Appeal shall be

(a) *Forrestal v. McDonald*, Cass. Dig. p. 241, No. 25.

final, etc.” But there is no essential difference, and no doubt the persistence of the Legislature in asserting jurisdiction would be treated as before by the Supreme Court. It was also unnecessary, inasmuch as an Act was passed by the Parliament of Canada at its last session, which is probably worded as this enactment is, and we may treat the law as now fixed by this phrasing. The alteration in the wording is not an improvement, and may give rise to serious questions. If we can attribute to the Parliament an intention to alter the law when it amends, the difference is very serious. The previous enactment was that no appeal should lie “without the special leave of” the Supreme Court or Court of Appeal, “unless the title to real estate or some interest therein, etc., is affected.” That is to say, leave to appeal was necessary unless the case came within one of the exceptions. But, by the present wording, the giving of the special leave is made one of the exceptions. That is to say, the decision of the Court of Appeal is final except where leave is granted. In other words, this exception as to granting leave is general in its terms, and covers all cases, and is not restricted to cases not falling within one of the other exceptions. One can hardly suppose that such a result was intended as that leave should have to be sought in every case, and we presume that no Court would so hold. And yet the alteration in language supports that view. Certainly the wording is very unhappy, and the only effect of the change is to produce this absurdity.

Amongst amendments to the Division Courts Act is one (sec. 14), whereby complaints, instead of being dismissed for want of jurisdiction, may be transferred to the High Court. The complete difference in procedure will of course necessitate a direction in each order as to the subsequent procedure, unless the common law practice is to be resorted to of pleading anew.

Section 28 makes an important change in the law of landlord and tenant. Hereafter a covenant by a lessee to pay taxes shall not include local improvement taxes unless therein specifically provided. This ought to have been sufficient for all purposes, as it would affect the

interpretation of all leases whether made under the Short Forms Act or not; but, with an inconsistency characteristic of no other body on earth, the Legislature proceeds in the same section to amend the Short Forms Act by adding a clause expressly excepting local improvement taxes from the covenant. Now the question arises, if the Short Form is used, and the parties strike out from this covenant the express exception of local improvements, is it "therein specifically provided" that the lessee shall pay them? Amongst ingenious devices to entangle words and meanings this clause deserves a high and important place. If the words remain in, then there is no doubt that, being expressly excepted, local improvement taxes are not included. But if the reference to them is deliberately struck out, can it be said that the covenant falls under the prior part of the section, which impliedly excepts them? We have had enough unsatisfactory decisions upon Short Forms, but it seems as if the cup were not yet full.

The devolution of estates on death is next dealt with. In 1891, by the Act 54 Vict. cap. 18, it was enacted that the real estate of a deceased person should shift into the beneficiaries at the expiration of a year from the death, but power was given to the personal representative to prevent this by registering a caution. If he omitted to caution, however, the land was irretrievably gone from him. In 1893, by the Act 56 Vict. cap. 20, power was given to caution after the land had shifted, and the Act, by section 4, was declared to be applicable to the estates of persons dying "before or after the passing of the said Act or this Act." The Act of 1891 was held not to be retrospective (*b*). But the effect of section 4 of the Act of 1893 was apparently to make it retrospective, and to enable the personal representative to caution after the time in cases to which the original Act had not applied at all. The Chancellor at first held that the effect of section 4 of the Act of 1893 was to make the Act of 1891 retrospective (*c*). Thus, though originally

(*b*) *Re Ferguson*, 11 Occ. N. 201.

(*c*) *Re Baird*, 13 Occ. N. 277.

not retrospective, it became retrospective after being in force two years. But again, in *Re Martin (d)*, the Chancellor, after further consideration, held that *Re Baird* was not correctly decided, and that the effect of the Act of 1893 was not to make the Act of 1891 retrospective. Thus the estate of a person dying before 4th May, 1891, was not subject to shifting or cautioning. And the Act of 1893 was therefore (contrary to its express terms) restricted in its retrospective operation to the estates of persons dying before the Act was passed but after the Act of 1891. Indescribable confusion resulted from this, and the Legislature has now (section 29 of the Act in review) amended section 4 of the Act of 1893 by striking out the words "before or," and thus making it retrospective to the passing of the Act of 1891, and prospective thenceforth. It also declares that the Act of 1891 only applied to the estates of persons dying after it was passed. Two periods are thus fixed—one, from the Devolution of Estates Act to 4th May, 1891, and the estates of persons dying during this period are not subject to shifting or cautioning; the other from 4th May, 1891, during which the estates of persons dying are liable to shifting and cautioning.

Provision is also made for selling free from dower; and, with a fine disregard of the conditions attending the different phases of a dowress' right, the statute speaks of the "estate of the tenant in dower" as if it were the only right of the dowress, whereas there is not one case in a thousand where a sale is desired after the dowress' interest has become an estate.

Section 10 of R. S. O. cap. 108, the Devolution of Estates Act, also receives attention. By that section personal representatives were to be deemed in law the "heirs and assigns" of any person dying after 1st July, 1886. This was an attempt to subject to the obligations of the deceased the person who took the assets. Objection has frequently been taken to the wording of the section, and it is now metamorphosed by section 31 of

the Act in review, by declaring that the personal representative shall, while the estate remains in him, be deemed in law the heir of the deceased; with the proviso that nothing is to affect the beneficial right to property or the construction of the words of limitation in a conveyance. Not much is gained by the change. The real object in view, necessitated by the change in the law, was to render the person who took the assets liable for the obligations of the deceased which were enforceable against the heir. Instead of proceeding directly to the point, the roundabout way is adopted, of attempting to make the personal representative "the heir" while he has the estate. It has hitherto been accepted that the devolution under the Act of Victoria upon the heirs was disturbed by the Devolution of Estates Act only to an extent necessary to let in the personal representative. But considering sec. 3 of chapter 15 of this session, are there any "heirs" left?

The property of married women next receives attention. There were two contradictory enactments on the Statute Book. Section 5 of R. S. O. cap. 108 provided for the distribution of the "real and personal property of a married woman on her death intestate." R. S. O. cap. 132, sec. 23, provided for the distribution of the "separate personal property" in the same event. Although the two sections afforded ground for argument that there were two kinds of married woman's property, as a matter of law that was not so. Section 32 of the Act in review now provides one mode of distribution for all married women's property "whether separate or otherwise," and section 33 repeals section 23 of R. S. O. cap. 132.

By section 87 of the Act in review, the long deserted Master's Office is to be again made the scene of references, and additional importance is attached to it by requiring appeals from the Master-in-Ordinary to go to a Divisional Court. For some reason or other, not easy to divine, the section as to compulsory references to the Master-in-Ordinary is made to "apply to references" made under the Act respecting Arbitrations, chapter 16 of the present session. Sections 28 to 35 of that Act



deal particularly and expressly with references to "Official Referees" and "special referees," provides for their remuneration, the effect of their reports, the details of the proceedings, and declares that an appeal may be heard by a Judge in Court. How is the section to "apply?" Are all the directions in chapter 16 to be ignored, and is the Master to proceed as he does in other cases? And is the appeal not to be to a Judge, but to a Divisional Court? Or, are the details of chapter 16 to be observed except as to the person—the Master-in-Ordinary being substituted for the Referee? It is clear that references under chapter 16 were considered by the Legislature to stand on a different footing from others, hence the danger that they would elude the Master-in-Ordinary. Was it the intention that no suitor in Toronto should be able to refer to a special referee? And is, then, the compulsory reference clause made to include them also? If so, it follows that if the Master-in-Ordinary hears a reference under chapter 16, the details of that Act ought to apply, and the appeal lies to a Judge. But then section 88 of chapter 14 looms up, and, being general in its terms, it may include all appeals from the Master-in-Ordinary, whether in references under chapter 16 or otherwise. So we must leave it in uncertainty.

The Act winds up with a characteristic clause as to interpretation which is worth nothing. "The sections of the Act amending any Statute may be read with and as part of the amended Statute." Good! When a Statute is amended, it is quite proper that the amendments should be read as part of the amended Statute. If it were not so it would be difficult to amend any Statute. When a man's leg is cut off, and a cork amendment is substituted, there may be cases in which the substitute would not be taken as part of the amended man. But when part of a Statute is cut off, and an amendment is made or substituted by the same instrument, we never heard that the amendment could not or should not be read into the Act. But even this plain enactment is qualified. The amendment is to be read with the amended Act, "where applicable and not inconsistent

therewith." When is an amendment applicable? When it is made. If inconsistent with the Act, what is to be done with it? Is effect to be given to it on the ground that of two inconsistent enactments the former ought to stand repealed by the later enactment? Or, is it not to be given effect to if inconsistent with the amended Act? If effect is to be given to it, what difference does it make whether it is part of, or separate from, the amended Act?

Chapter 15 deals with amendments made in contemplation of the revision of 1897. The most extraordinary provision is that contained in section 3. This provides that sections 31 to 57 of the Devolution of Estates Act, R. S. O. cap. 108, which are the sections commonly known as the Statute of Victoria as to inheritance, are to apply retrospectively to the 1st January, 1852, the date of the passing of the original Act, and also prospectively as the case may be. This is clear enough in one way, i.e., the period from 1st January, 1852, to the present time is covered by these sections, and the future also, as the case may be. Bearing in mind the change effected by the Devolution of Estates Act, the accepted interpretation of this has been that the heirs-at-law under the Statute of Victoria still take, but their enjoyment is subject to the temporary ownership of the personal representative. But the amending clause goes on to contradict this, and say that sections 28 to 45, which are all the sections providing for the course of descent, shall not apply to the estates of persons dying on or after the 1st July, 1886, the day the Devolution of Estates Act came into force. How then are estates to be distributed? The repeal, as it practically is, of these sections, does not revive the Statute of William or the Common Law as to descent. What then is the law? Are we to find it in section 4 of the Act? Real property is to be distributed as personal property is hereafter to be distributed. Are the next of kin under the Statute of Distribution to take? "Heirs" are dealt with in section 31 of chapter 14 of this session, so the Legislature at one time, during the session at any rate, thought it had not abolished them. But what warrant have we for saying they exist after this amendment is made? And the difficulty is

increased by the section proceeding to say that the remainder of the Act shall apply to such estates, subject to these sections which form the original Devolution of Estates Act. Truly the spirit droops and the flesh becomes weary in the contemplation of it.

The section of the Wills Act, taken from Locke King's Act, is amended by adding a clause to cover in express terms money equitably charged on lands.

The Act respecting the assignment of choses in action is amended by a complete set of new sections being substituted for the old. Under the previous enactment, every debt and chose in action "arising out of contract" was made assignable, and the assignee might sue in his own name, and claim as assignee of the first assignor if there were mesne assignments, and the defences of set-off existing before assignment were available against the assignee. By the new enactment, "any absolute assignment" (not by way of mortgage or charge) "of any debt or other legal chose in action" is effectual to transfer it, notice being given. This is more extensive than the previous Act in permitting the assignment of any chose in action, whether arising out of contract or not. Indeed the wording is sufficiently comprehensive, by reference to "the trustee" and otherwise, to cover the case of money payable to a married woman who is restrained from anticipating, if that case should not be considered as standing in so peculiar a position as not to be affected by general legislation. It is less extensive than the old law in that it requires notice to be given as an essential element of the transfer, and the assignment to be absolute and not by way of security. For instance, if a mortgage is now assigned by way of security only the assignee will not be able to sue in his own name.

The amendments of note in the schedules to this Act are shortly the following:

The Acts of Notaries in Canada are evidence in our Courts where before those of Ontario and Quebec only were evidence.

The Mortgage Act, as to assignment of a mortgage instead of a re-conveyance, to any person entitled to redeem, is modified by the adoption of a clause which has been for some time in force in England. The prior rights of incumbrancers to "requisition" the legal estate from the mortgagee are dealt with in this way, that a requisition from a prior incumbrancer is to prevail over a requisition of a subsequent one, and that of an incumbrancer over the mortgagor himself. Although the amendment is designed to avoid the Chancery suit, which Sir George Jessel said would sometimes be necessary in order to ascertain who is entitled to redeem, it should not do away with the salutary rule that a subsequent incumbrancer should protect himself by notifying prior incumbrancers of his mortgage, a practice which might, if adhered to, save many difficulties which now arise for want of its observance. The effect of the amendment will probably be far-reaching in another direction. If a mortgagor raises a loan to pay off a first mortgage, and requests an assignment of it to his new mortgagee, will not the requisition of the second mortgagee take priority over that of the mortgagor? And if the new mortgagee should make the requisition will not the requisition of the second mortgagee, at any rate, take priority over him? The new mortgagee cannot get priority until he secures the assignment of the first mortgage, and he cannot do that if the second mortgagee makes the requisition. The original purpose was to enable the mortgagor to raise a new loan and require an assignment to secure the lender. But this section interposes a very serious obstacle to the carrying out of the very purpose of the Act.

The Short Form of Leases Act is amended by making covenants with the lessor apply to his heirs and assigns; by assimilating the exception in the covenants as to repair and leaving in repair; by excepting from those covenants damage by lightning and tempest as well as fire, so that if a window shutter is blown off the tenant need not put it on again; and by a slight amendment to the proviso for re-entry.

Power is given to the Law Society to suspend a Barrister, or report a Solicitor for suspension. Hitherto, the only remedy the Society possessed was to disbar or report for striking off the rolls. And many serious offences went unpunished, which the Society thought were not flagrant enough to justify the extreme measure. The expedient of disbarring, or reporting for striking off the rolls, with a promise to restore after a certain period, never seems to have occurred to the Benchers, although it is a very obvious one.

We have before pointed out that though the Acts of 1891 and 1893 affecting the sale of land by executors speak of more than one caution being registered, no provision is made in either of them for registering more than one. The Act of 1891 is now amended by adding a clause expressly allowing more than one caution to be registered. Before a caution expires, another may be registered, and so on as long as the executor or administrator considers it necessary so to act, and every caution remains in force for twelve months from the time of its registration.

An important amendment is made to the Landlord and Tenant Act, as amended by 57 Vict. cap. 43. Goods of the wife, husband, daughter, son, etc., of the tenant, on the premises, were not exempt from distress. But a chattel mortgagee of one of these persons, not being included expressly, could not be included by implication. The result was that if a landlord distrained, although the wife of the tenant could not claim exemption, her assignee could. The amendment is now made to include the person claiming under the relatives named.

The power to relieve against penalties, forfeitures and agreements for liquidated damages is modified by confining it to penalties and forfeitures. At the same time, attention might well have been paid to the serious question whether this general power to relieve overrides the restricted powers of relief in the Landlord and Tenant Act. Probably it does not, on the ground that the special enactment is not affected by the general enactment. But it has been seriously argued that it does, and

a declaration to the contrary would have been very opportune.

A limitation of two years is given for infant dowresses who have affected to bar their dower to bring their actions for dower or give notice that they claim dower.

A most satisfactory and radical alteration of the law respecting arbitrations is made by chapter 16. The Acts relating to submissions to arbitration were in such confusion as to moving against awards that it seemed impossible to get a satisfactory, and in some cases any, meaning out of them. The whole body is now swept away by the introduction of the Imperial Act, which is concise, and, so far as one can see, plain in expression. The chief features are that the matters referred may be remitted from time to time, arbitrators misconducting themselves may be removed and the award set aside, an award may by leave of the Court be enforced in the same manner as a judgment or order, where agreed to an appeal lies to the High Court and the Court of Appeal in the same manner as in the case of references under order of Court, and applications to set aside awards other than by way of appeal must be made within six weeks after the publication.

By chapter 22 a death blow has been struck at defences to actions against married women on contracts. The Imperial Act of 1895 is introduced verbatim, but preceding Acts are not expressly repealed. In fact subsections 3 and 4 of section 3 of the present Act, R. S. O. cap. 132, are expressly retained. Nothing is said about actions of damages, which is to be regretted. The revised Act, sec. 3, sub-sec. 2, speaks of the recovery of damages "in any such action," and the section speaks otherwise only of her rendering herself liable "on any contract." Presumably, therefore, the damages referred to are damages in an action on contract. A very short section would have sufficed to clear this up, and settle at once all difficulties of procedure in obtaining judgment.

The effect of the new enactment is as follows:—Every contract of a married woman is deemed to bind separate

property, whether she has any or not at the time of the contract. The latter part is the effective enactment. A similar enactment in the previous Act, without the concluding qualification, was held not to dispense with proof that she had separate property at the time of the contract. The contract binds all separate property which she may have at the time or thereafter. It binds not only her separate property, which can exist only during coverture, but all property which she may afterwards acquire while discoverd. An attempt was made in *Pelton v. Harrison* (e) to get satisfaction against property of a widow that was not available while she was married, but was unsuccessful. The present enactment is intended to enable a creditor who has judgment against separate estate, or a contract charging separate estate, to get satisfaction out of property acquired when the married woman becomes discoverd. Notwithstanding sub-section 2, which enacts that nothing in the section shall render available to satisfy an obligation any separate property which the married woman is restrained from anticipating, a question may still arise whether such property may not ultimately have to satisfy the debt if the defendant should become a widow. Thus, a judgment may be obtained without proof of separate estate. It is to be satisfied out of separate estate, present or future, which she is not restrained from anticipating. During the coverture, property subject to restraint is protected. At the death of the husband, the qualification of "separate" disappearing and the restraint ceasing to exist, cannot the judgment then be satisfied out of this property under sub-sec. (c) of section 1? It is hazardous to express an opinion on this class of legislation, but it seems as if an affirmative answer to this question would be proper. Another opening, we think, exists which might have been closed. A married woman having separate property subject to restraint and dying, there is no reason why creditors who were unable to recover in her lifetime should not have satisfaction after her death, if the limitations of the property do not intervene. The

(e) L. R. 1891, 2 Q. B. 422.



restraint is for her protection, and in fact separate property can exist only during coverture, and there is no reason why creditors should not be paid out of available property when she is dead. Again, though a married woman may not acquire property in her lifetime, it may fall into her estate and be acquired by her executors or administrators after her death. A judgment under sec. 1, sub-sec. (b), apparently binds only such "separate" property as is acquired by her thereafter. That necessarily means in her lifetime. It would have been well to subject property falling into her estate and payment of her debts. Whether section 22 of R. S. O. cap. 132, which has never been interpreted, will cover this point or not remains to be seen. The personal representative is there declared to hold her property subject to the same liabilities as if she were living. The opportunity was presented of clearing up the point, but it has not been embraced. The same section might be used to prevent the creditor from recovering out of property after her death which was subject to restraint during her life. For the personal representative holds it "subject to the same jurisdiction as she would be if she were living." If she was restrained from anticipating, might not the personal representative claim the same benefit? It would be entirely unworkable and absurd, but there the words are.

The practice of photographing an Imperial Act, and printing it in the statute book of Ontario, is more often than not, productive of beneficial results, but a knowledge of existing laws is essential to determine the policy of this course of procedure in each case. The results may not be the same here as in England. The reproduction of section 2 of the Act in review seems to contribute to the idea expressed in a definition of Evolution recently given by a writer in the Contemporary Review. "Evolution," he says, "is the orderly sequence of the unintended." Now, the actual effect of section 2 of this Act will, we think, be entirely unintended. It declares that the section of the Wills Act which makes a will speak from the death, with regard to the real and personal property comprised therein, shall apply to the



will of a married woman made during coverture, whether she has separate property or not at the time of making it, and that such will shall not require to be re-executed or re-published after the death of her husband. A chapter might be written on this, but first let us see how our own legislation stood when this section was enacted.

By C. S. U. C. cap. 73, sec. 16, a married woman had power to devise her property "to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she may see fit, in the same way as if she were sole and unmarried." This remained the law until the Wills Act, 1873, was passed, wherein it was enacted that, "The term 'person,' and also the term 'testator,' shall include a married woman." So that by this enactment, not only section 26 of the Wills Act applied to the wills of married women, but the whole Act applied, and it was unnecessary for the husband to join or for re-execution to take place after his death. In fact a married woman was included in every phase of the law of wills. Again, in the year preceding the passing of the Wills Act, separate estate had been introduced, and the husband need not have joined in a will of that species of property. When the statutes were consolidated in 1877, the Wills Act retained the clause, "'person' and 'testator' shall include a married woman" (f). And the law remained in this satisfactory condition until 1887, when the statutes were again consolidated, and the revisors or the printer (history does not tell which) dropped the above clause from the Wills Act, a fact which the writer has pointed out in another place (g). Why this was done is not clear, but it may be safe to affirm that it was not intended to take away the right of making a will from a married woman. In the meantime, the Married Woman's Property Act of 1884 was passed, and consolidated in R. S. O. of 1887, cap. 132, sec. 3, whereby a married woman is expressly enabled to dispose by will of her separate property. And the result

(f) R. S. O. 1877, cap. 106, sec. 9, sub-sec. 4.

(g) Armour on Titles, p. 316.

of the decision in *Moore v. Jackson* (*h*) is that there is no property that is owned by a married woman that is not separate property, except perhaps property falling under the last clause of sub-sec. 2 of sec. 4 of R. S. O. cap. 132. In the face of this legislation it is not easy to see the reason (if indeed there was one) which actuated the gentleman who introduced this clause. A restoration of the interpretation clause in the Wills Act would have covered what is reached by this clause and more too. The state of the law in England and the reasons for its passage there were entirely different, as will be seen from a perusal of *Willock v. Noble* (*i*), and *Bilke v. Roper* (*j*). The clause has to be dealt with, however. Assuming, as we think it clear, that all property owned by a married woman in Ontario is separate property for purposes of conveyance, and regarding the Property Act, which enables a married woman to dispose by will of her separate property, it follows that married women had full and ample testamentary powers before this section was passed, and the Wills Act would apply to the will of every person. Now we have a clause which makes but one section of the Wills Act apply. Is not the inference to be drawn that no other part of the Act applies, having regard to the foregoing considerations, coupled with the fact that the Legislature repealed the clause by which "person" included "married woman?" It might be so, if the Legislature had not had the foresight to declare that its amendments do not involve a declaration of the previous law, or that it has been changed. It is to be hoped that a little common sense will prevail in the revision of 1897, and that the last interpretation clause of the Wills Act will be restored.

In chapter 26, the government has, so to speak, taken a pledge, but at the same time allowed certain avenues of escape in case the old taste should revive. This Act, which does not come into force until proclaimed by the Lieutenant-Governor, proposes to limit the right of the

(*h*) 22 S. C. R. 210.

(*i*) L. R. 7 H. L. C. 580.

(*j*) 45 Ch. D. 632.

Lieutenant-Governor to create more than five Queen's Counsel in one year, or twenty in four years. Inasmuch as the fault, if there be any, lies with the advisers of the Crown, it is peculiar circumstance that the chief adviser should have introduced a bill which is practically a condemnation of his own advice, rather than have foregone making the numerous appointments which it had become the practice to make.

The exceptions, which practically nullify the Act, are that the Lieutenant-Governor may appoint the Attorney-General or Solicitor-General of Canada, or the Attorney-General of the Province to be Queen's Counsel, which is peculiar, inasmuch as they are ex-officio Her Majesty's Counsel. Next any one of Her Majesty's Counsel appointed by the Governor-General for the Federal Courts, who has not already been appointed by the Provincial Government. Thus, if the desire returns to appoint another batch of Queen's Counsel, all that is to be done is to communicate with Ottawa, and allege that Her Majesty, in right of the Province, desires to retain Counsel, but, as her faithful Commoners will not allow her, she desires the Governor-General to appoint her Counsel in right of the Dominion, and so restore her prerogative right in the Province. The next qualification and limitation of the power is that gentlemen of the Bar must be at least of ten year's standing before they can be appointed. In another sense, the Act is of very great constitutional importance. It is a direct and positive interference by the Legislature with the prerogative, or perhaps only the ordinary right, of the Crown to retain Counsel. Any subject of Her Majesty may retain as many Counsel as he pleases, and there is no reason why the Crown should not be undisturbed in its prerogative right to appoint as many Counsel as may be thought necessary. If the advisers of the day overstep the limitations of moderation in making appointments, that is a matter for which they are responsible to the House, but to impose limitations upon themselves, or upon the Crown, for their own acts seems somewhat absurd.

Bicycles have been treated to a good deal of legislation. The Municipal Amendment Act, chapter 45, section 19, gives power to a municipality to set apart a bicycle path upon the road, and makes the penalties imposed by The Public Highways Act applicable, in case a cart, waggon or horse is driven over the path. In order to emphasize this legislation, a whole chapter is devoted to the same subject, chapter 57 of the present session; by it precisely the same law is enacted. Either the Legislature is desirous of emphasizing what it says, or some one has a very short memory for what takes place during the session.

Again, the Highways Act is amended by making a special law of the road with regard to bicycles and tricycles. In these days of horseless carriages, the Highways Act was found to be so restricted in its wording as to afford ground for holding that it did not apply to horseless carriages at all. The first clause runs, "In case a person travelling or being upon the highway in charge of a vehicle drawn by one or more horses . . . meets another vehicle, etc." The English Highways Act does not contain the words "drawn by one or more horses," or other like expression, the result being, as we have before pointed out (*k*), that all carriages driven, drawn or led on the highway in any way must obey the law of the road. We have already expressed the opinion that horseless carriages must obey our statute, although the Act refers specifically to vehicles drawn by horses, otherwise being lawfully on the road, they have superior rights to either vehicles drawn by horses or other animals. This common sense view has been followed in Division Court suits where actions of damages have been instituted, and we believe there is only one Judge who has held to the contrary, and although holding that a wheelman was lawfully on the road, imposed on him the obligation of keeping out of everyone else's way. The advent of horseless carriages should have been a signal for striking out of the Act the words, "drawn by

(*k*) 13 C. L. T. 261.

one or more horses," so that no doubt should have prevailed, and thus the Act would have been in the same condition as the English legislation, applicable to all vehicles which are on the highway in charge of any person. The Legislature in its wisdom, however, has seen fit to impose special limitations upon bicycles and tricycles, and to leave the motor carriage to either a law of its own or to fall under the original Act. A person in charge of a vehicle drawn by a horse is only to allow a person travelling upon a bicycle sufficient room to pass "where practicable." Who is to be the judge of the practicability? It is left an open question, and will no doubt be resolved by the person driving the carriage drawn by horses in his own favour. He may find it impracticable, not from the state of the road, but from circumstances known to himself only, which cannot be appreciated by other persons. In any event, the result is to raise a question in every case as to the practicability of allowing a person lawfully travelling on the highway room to pass. It is very easy to see that the wheelman under these circumstances is practically, to use the legislative expression, deprived of his rights.

Again, a wheelman overtaking a vehicle drawn by horses, or a horseman travelling at less speed, is obliged to give "audible warning" of his approach before attempting to pass. What is the signification of "audible warning?" Suppose the driver of the carriage is deaf, any warning would not be audible. Must it be audible to the person driving the carriage? That apparently is the common sense view, for he is the one entitled to get the warning. If the circumstances are such that the wheelman cannot make the driver hear, he passes at his own risk, under a penalty of not less than one dollar nor more than twenty dollars in the discretion of any justice before whom he may be taken. These entirely unnecessary and irritating limitations upon a mode of travel which is perfectly lawful, and is becoming universal, will, we feel sure, not meet with the general approval of the public.

Many other important statutes and amendments have been made, which it is impossible to review. The statute book of this year is the largest, heaviest and most varied in its provisions of any which has been issued for many years. We wish very much that we could say that the legislation has been beneficial. We regret to say that many questions, which very little thought would have cleared up, have been left in the most unsatisfactory condition, and in some cases, we almost despair of arriving at their meaning.

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## EDITORIAL REVIEW.

### **Statute of Limitations—A Correction.**

In our remarks upon the Statute of Limitations as a Conveyancer (ante, p. 93), we referred to a note of a peculiar case decided by the Chancellor of McLaren v. Strachan, but a mistake was made in proof reading, whereby the wrong reference was given. The correct reference is 23 Ont. R. at p. 210.

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## BOOK REVIEWS.

*A Handy Book on Fire Insurance Law* affecting the company and its customer, being the fire sections of the Ontario Insurance Act, 1897, with the Ontario decisions since 1876, and the decisions of the Supreme Court of Canada. Compiled by RODERICK JAMES MACLENNAN, of Osgoode Hall, Barrister-at-Law. Toronto: The Carswell Co., Limited. 1897.

This is a most creditable work of its kind. While its scope is narrow, as its title indicates, it is orderly and logical in its arrangement, comprehensive in its treatment of the subject, and compact, concise and complete in its material.

It deals in order with the subject-matter of insurance, the application, the premium and premium note, the contract and its conditions, changes material to the risk, other insurance, the agent and his relation to the contracting parties, proof, subrogation and mortgages, and legal proceedings.

The manner in which the text is written is to compress into as small a space as possible the essential idea. If there is any defect it is that information in the reader is assumed, whereas the author's duty is to impart it. The paragraphs in some cases resemble head notes rather than the parts of a treatise. And although in nine cases out of ten they are models of clearness, the tenth is sometimes obscure, or compels too severe attention by its extreme conciseness. However, as we have remarked, the work is a very creditable one, and will no doubt be found a very useful one.

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*Commentaries on the Laws of England.* In four books. By SIR WILLIAM BLACKSTONE, Knight, one of the Justices of His Majesty's Court of Common Pleas, with notes selected, etc. By WILLIAM DRAPER LEWIS, Ph.D., Dean of the Department of Law of the University of Pennsylvania. Books 3 and 4. Philadelphia: Rees Welsh & Co. 1897.

These volumes, dealing as they do with private and public wrongs respectively, afford more scope for general information than vol. 2. The notes are consequently somewhat more generous in scope. Taken all in all, while the book awakened greater hope of enlivening the work of Blackstone by the infusion of modern law in the notes than have been realized to the present writer, it is a distinct benefit to have in such a small compass the great variety of matter which appears in the notes. In a separate cover with the index and table of cases there is printed a catechism by BARRON FIELD, Esq., with references for the answers to the text, which will endear this edition to the heart of the student-at-law.

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*The Dominion Conveyancer.* Comprising precedents for general use and clauses from special cases selected and edited by WILLIAM HOWARD HUNTER, B.A., of Osgoode Hall, Barrister-at-Law. Second edition, revised and enlarged. Toronto: The Carswell Co., Limited. 1897.

The fact that a second edition of this work has become necessary is a sufficient evidence that it has been found useful. While it does not fulfil all the requirements of a conveyancing book for the profession, there is such a variety of forms as to reach a great many cases which are not comprised in the ordinary books.

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*The No-liability Mining Companies Act, 1896,* (60 Vict. No. 15). Edited, with notes, cross-references, and short chapters on the formation, management and winding up of a no-liability company, and with a copious index. By T. ROLIN, M.A., Barrister-at-Law, and G. E. RICH, M.A., Barrister-at-Law. Sydney: Hayes Brothers. 1897.

This little work consists of the New South Wales Act, together with notes upon the various sections, and various suggestions as to legislation and regulations. A very useful mode of legislation is to be found here in the addition of rules, made under the authority of the Act, which might well be adopted in this country, so as to enable cases suddenly requiring authoritative treatment to receive it without extra legislation.



# THE CANADIAN LAW TIMES.

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SEPTEMBER, 1897.

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## MISDESCRIPTIONS IN WILLS.

**I**N the case of *McFayden v. McFayden (a)*, decided in June, 1896, by Mr. Justice Ferguson, a testator, purporting to devise all his real and personal estate, gave to one son the south fifty acres of lot 21, and to another the north 50 acres of the same lot. The will contained no residuary devise, and no other gift of land. The testator died seised of the east half of lot 21 (100 acres), but had no interest in the west half. It was held that "one son took the south 25 acres of the east half of the lot, and the other the north 25 acres, and that they took together the central 50 acres as tenants in common."

The case seems to the writer to be noteworthy for various reasons: In the first place, it touches a branch of the law relating to wills, which has always seemed to be in a highly unsatisfactory condition, more particularly as applied to existing conditions in this country. Without desiring to be classed with that unenviable individual, very justly designated by Mr. A. H. Marsh in a recent issue of this journal as "that bull in a china-shop, the heaven-born law-reformer," one may be pardoned, we think, if he puts forward a plea for a change in the law on this head. Again, the case serves as a reminder of the fact that upon the point of law involved, two distinct and contradictory currents of authority have for some time been running side by side in our case law. And in

(a) 27 O. R. 598.

the third place, it seems to the writer (who expresses the opinion with much diffidence, and with all possible deference to the view of the learned Judge who decided the case), that it is extremely difficult to reconcile the decision with the authorities.

The general legal question involved relates to the extent to which the Court may properly go in aid of a testator, by correcting an erroneous description of the subject of a devise, and involves incidentally the question of the admissibility, for that purpose, of extrinsic evidence.

Of the two currents of authority mentioned, the one tends in the direction of a rigid adherence to the description contained in the will, the exclusion of extrinsic evidence, and a passive determination to suffer the devise to fall, if its terms, unaided by the intervention of the Court, have failed in effecting its object.

The other current favours a much more liberal construction, and inclines to approve the correction by the Court of the mistaken description, if, in the light of extrinsic evidence, it is reasonably certain that a mistake has been made in the will.

It will at once be seen that the second current of authority is the one which, at first sight, seems most in consonance with the general rules relating to the construction of wills.

The testator is proverbially a favoured individual; in a multitude of ways the Courts show him complaisance; his careless mistakes are corrected; his ungrammatical, sometimes unintelligible, language is pondered by the Court with untiring patience, and a meaning evolved from, or attributed to it, oftentimes at the cost of much straining. His loose and inaccurate descriptions of property or persons are scanned in the light of extrinsic evidence, and fitted to their subject or object. In a word, he is treated, and properly so, from the peculiarity of his circumstances, as the petted and spoiled child of the Courts, and his will is treated in a becomingly liberal spirit, so as to give effect to his intention if the same is at all discernible. But, on the particular point of law on

which the case now discussed hinges, all this is reversed. The more approved authority ordains that no undue softness is to characterize the conduct of the Court, but that the testator is to be treated by the same rigid rules of construction as are applied to less favoured individuals. For it must be admitted that of the two currents of authority above referred to, the former is by far the more potent, so much so, indeed, that one would seem to hazard little in predicting, in regard to any case which turned upon the point of law in question, that it would infallibly be decided by our own Courts on the lines of that doctrine.

The more liberal doctrine rests upon a limited number of cases (*aa*), and would seem to be the outcome partly of the good nature, partly of the sense of natural justice of the Court. It may be remarked, too, that the cases on which it rests are largely *ex parte*, and further that one of its quondam weightiest adherents has more recently, as will appear below, when sitting in a higher Court, expressed a change of view upon the subject.

The following propositions upon the subject may, we think, be taken to be settled law:

1. (*a*) If A., owning a definite portion of a lot, say the north-east quarter, leave a will devising a different portion, say the north-west quarter of that lot, without more, the devise falls to the ground, and there is an intestacy as to the land owned by the testator.

(*b*) In such a case extrinsic evidence is not admissible to show that the testator owned the north-east quarter, and no other land, for the purpose of establishing a mistake in the description.

2. If A., instead of making a bald devise as in the case above supposed, use words indicating an intention to dispose of land owned by himself, extrinsic evidence would then be admissible, and the Court would, in the light of it, if a proper case were made out, correct the mistake and uphold the devise.

(*aa*) See *Re Shaver*, 6 O. R. 312; *Re O'Callaghan*, 8 P. R. 474.

It is undoubtedly the case that nothing is more fallacious than to take it as a proposition of undoubted authority that the intention of the testator must govern in the construction of wills. The proposition is indisputable if it is laid down with the qualification that such intention must be gathered from the will itself. It is not a question of convincing the Court that the testator intended to make such and such a provision; they may be convinced beyond a doubt as to that, and yet feel themselves constrained by well established rules of law to deliberately defeat such intention by their decision. Were it otherwise, the Court would, in effect, be taking upon itself to make a new will for the testator. In this connection, the words of the late Chief Justice Robinson in *Doe d. Lowry v. Grant* (b) are in point: "There would be no room for doubt in this case if the power of this Court were unlimited for giving effect to what they see upon the face of a will was the real intention of the testator; for it is plain that the intention here was to devise all the land which he owned in the Township of Huntley to his sons Edward and Samuel. The only question is whether we are authorized to say so by the rules of construction which the Court have adopted." Also the expression of the present learned Chief Justice of Ontario in *Doyle v. Nagle* (c): "There can be very little doubt that what the testator intended to devise was lot 12; but if there was nothing further in the case than the facts I have just stated, there is a clear and well defined rule of law which stands inexorably in the way of receiving evidence that that lot was intended."

The question as to the admissibility of extrinsic evidence has been discussed in a number of our own as well as in various English cases, and although, as remarked by the learned Chancellor of Ontario, in *Hickey v. Stover*, *infra*, "It is difficult, perhaps impossible, to reconcile all the cases decided upon the admission of parol evidence to aid in the interpretation of wills," it may, we think, be taken as amply established that some species of latent

(b) 7 U. C. R. 127.

(c) 24 A. R. 165.

ambiguity must exist in the will to warrant the introduction of such evidence. The text books upon the subject, when dealing with the general question of the admissibility of extrinsic evidence in case of wills, draw attention to the distinction which exists between (1) evidence of the testator's intention, and (2) evidence of the circumstances from which the Court may conclude what his intention must have been, and remark that the former evidence is admissible only in rare cases, while the latter is generally admissible; thus, "All facts relating to the subject matter of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will" (*d*).

The question has been discussed on various occasions, in our own Courts, with special reference to cases of the nature of that now under consideration. In *Summers v. Summers* (*e*), the learned Judge who tried the case now commented on dealt with the question as follows: "Evidence of two kinds is adduced by affidavits: First, to show the circumstances that surrounded the testator at the time he made his will, the leading one of which is that he did not own and never had owned the one lot, and that he did own the other; and secondly, evidence of the intention of the testator in regard to the subject and object of gifts. The former kind of evidence is, I think, admissible, the latter I think is not. In *Wigram on Wills*, 4th ed., at p. 65, it is stated that a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by the will. The same is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can in any

(*d*) *Doe. d. Templeton v. Martin*, 4 B. & Ad. 771, 785, per Parke, J.; *Sanford v. Raikes*, 1 Mer. 646; *Theobald on Wills*, 4th ed. 101.

(*e*) 5 O. R. at p. 112.

way be made ancillary to the right interpretation of a testator's words." And again, *ib.*, at p. 94, "Where the words of a will, aided by the evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases) will be void for uncertainty." And again, *ib.*, at p. 109, "Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by the material facts of the case, are insufficient to determine the testator's meaning, Courts, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended where the description in the will is insufficient for the purpose. These cases may be thus defined: Where the object of a testator's bounty or the subject of disposition (*i.e.*, the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator. Following this rule, it is plain, I think, that evidence of the testator's intention cannot be received at all, and it is equally plain, I think, that evidence of extrinsic facts can only be received for the purposes of the right interpretation of the testator's words."

The learned Judge in the same judgment also quotes Jarman on Wills, 3rd ed. at p. 379, as follows: "As the law requires wills, both of real and personal estate (with an inconsiderable exception), to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, vary, add to or subtract from the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even when the consequence is the partial or total failure of the testator's intended disposition, for it would have been of little avail to require that a will *ab origine* be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied or its inaccuracies corrected from extrinsic sources."

The case of *Summers v. Summers* was followed by *Hickey v. Stover* (f), which came, in the first instance, before the same learned Judge whose finding, in accordance with the rigid doctrine of construction, was confirmed in the Divisional Court (Boyd, C., and Proudfoot, J.). In that case, it was held, as stated in the head note, "that the devise being in its terms free from ambiguity, the Judge below was right in rejecting evidence of extrinsic facts, and that even if it might have been shown that lot 20 in Concession 8 was the only land which the testatrix owned, the will [which, by mistake as alleged, described a different lot] could not operate to pass it."

The learned Chancellor in this case deals with the matter as follows, p. 111: "Assuming that it could be proved that the testatrix had no other land than lot 20 in the 8th Concession of Raleigh, that would not affect the result. The admonition addressed by Lord Wensleydale to the Irish Courts in *West v. Lawday*, 11 H. L. C. 375, is of prime importance. He says (at p. 388): 'The duty of the Courts in the construction of all wills is not to speculate upon the meaning of the words used by the testator which lets in the consideration what he intended to have done; but to recollect strictly that their duty is to look at the words of the will and see what the words of the will mean. . . . The duty of the Judges is to ascertain the meaning of the words of the will.' Following up that cardinal rule, Lord Hatherly, in *Gordon v. Gordon*, L. R. 5 H. L. 254, advises (at p. 271), that in construing a will, if the words are themselves of doubtful meaning, the circumstances of the case may be referred to for the purpose of assisting in the explanation, but must not be employed to show the construction to be doubtful in order to enable the Court to make what appears to be a more reasonable will for the testator. So again in *Martineau v. Briggs*, 23 W. R. 889, the House of Lords laid it down clearly that the argument *ab inconvenienti* cannot be legitimately resorted to unless there is ambiguity on the face of the will. See per Fry, J., in *Homer v. Homer*, L. R. 8 Ch. D. at p. 762." And again, "The devise is in its

(f) 11 O. R. 106.



terms free from all ambiguity; it is not inherently absurd or insensible; it is not inconsistent with any context. The maxim pertinent to such a case is *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verbis expressa fienda est*, Co. Litt. 147 a." And again, p. 113, "That case [*Doe Lowry v. Grant*] falls within the rule subsequently condensed from the authorities and enunciated by Page Wood, V.C., in *Stanley v. Stanley*, 2 J. & H. at p. 573, that if you can, from all the expressions used throughout the will, together with the surrounding circumstances, arrive at a clear conclusion, then, and then only, are you entitled to strike out or alter qualifying words. In *Hardwick v. Hardwick*, L. R. 16 Eq. at p. 175, Lord Selborne is thus reported: It is perfectly certain that if all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence so as to exclude (qu. include) anything which any of those terms does not accurately fit. On the other hand, I apprehend that if the words of description, when examined, do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of the description and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded."

In the same case, Proudfoot, J., says at p. 119, "The cases in the American Courts are conflicting, but the great preponderance of authority is against the admission of such evidence: *Judy v. Gilbert*, 77 Ind. 96, 40 Am. R. 289." (g).

(g) This is very broadly stated. There are, however, a good many cases in the American Courts in which the leaning has been in the other direction. In *Patch v. White*, 117 U. S. 210, the testator, after saying, "And touching worldly estate I give, devise and dispose of the same in the following manner," devised certain specific lots with the buildings thereon respectively to each of his near relatives, and amongst others and his brother H., a lot described as lot No. 5 in square 403, together with the improvements thereon erected. He then devised to his infant son as follows:—"The balance of my real estate, believed to be and to consist in lots numbered 6, 8 and 9, etc.," describing a number of lots, but not describing lot No. 3, in square 406, hereafter mentioned. It was held (1) that the testator intended to dispose of all his real estate, and thought he had done so; (2) that in the devise to H., he believed he was



So much for the question as to admissibility of extrinsic evidence. We think it will be generally conceded, in spite of some discrepancy in the cases, that the more approved doctrine is that enunciated in the proposition above stated.

Now, as to the two contradictory doctrines, *Re Shaver* (*h*) may be taken as typical of the class of cases supporting the more liberal doctrine. In that case the devise was as follows: "I devise the south-west quarter of lot 5, Concession 2, of the Township of Westminster, containing 50 acres more or less, to H. P. S." It was a bald devise unassisted by any preliminary declaration, such as was found in *Doe Lowry v. Grant*, *supra*, indicating an intention on the part of the testator of disposing of property which he owned at the time of making the will. The facts of the case were that the testator owned the south-east quarter of the lot in question, but not the south-west quarter which he assumed to deal with, nor any other portion of that lot. The learned Chancellor before whom the case came received evidence of the surrounding circumstances above mentioned, and corrected and upheld the devise. His reasoning was as follows:

giving him one of his own lots; (3) that evidence might properly be received to show that the testator was not and never had been the owner of lot 6 in square 403, which had no improvements thereon, but did own lot No. 3 in square 406, which had a house thereon occupied by his tenants; and that this raised a latent ambiguity, and that this evidence, taken in connection with the context of the will, was sufficient to show that there was an error in the description, and that the lot really devised was lot 3 in square 406. In *Merrick v. Merrick*, 37 Ohio St. 126; S. C. 41 Am. Rep. 493, a testator devised his lands to B. for life in the following words:—"All the . . . real estate I may die seised of." He owned 160 acres of land and no more, one-half of which was in section 27, the other half being the east half of the north-east quarter of section 28. He devised the portion in section 27 by a correct description to C., at the death of B., charged with certain legacies, and devised the portion in section 28 to D. at the death of B., also charged with certain legacies, but by mistake in the particular description of the land devised to D, the word "south" was inserted instead of "north." It was held that so much of the description as was erroneous should be rejected, and that the land would pass to D. on the death of B. by the other provisions of the will. See also *Allan v. Lyons*, 2 Wash. (U.S.) 475; *Riggs v. Myers*, 20 Mo. 239; *Winkley v. Kairne*, 32 N. H. 268; compare *Kurtz v. Hibner*, 55 Ill. 514; S. C. 8 Am. Rep. 665, and note; see also *Chambers v. Watson*, 60 Iowa 339; S. C. 46 Am. Rep. 70; *Waldron v. Waldron*, 45 Mich. 350.

(*h*) 6 O. R. 312.

"The authorities show that you may reject any erroneous part of the description if you have enough left to identify the subject matter devised (*i*). It is evident that the testator intended to devise the quarter of the lot to his son, but he calls it by mistake the south-west instead of the south-east quarter. Omit the words south-west quarter and you have a sufficient description of what was meant. It would then read 'I devise to my son 50 acres of lot 5 in the second Concession of Westminster.' Extrinsic evidence may be given to show what 50 acres he owned of that lot, so as to localize and ascertain the quarter devised: *Bleakley v. Smith*, 11 Sim. 150; *Shardlow v. Cotterell*, L. R. 20 Ch. D. 9; *Kean v. Drope*, 35 U. C. R. 421; *Wigram on Wills*, pp. 68, 367; *Re Callaghan*, 8 P. R. 415."

The learned Chancellor remarks that the case is widely distinguishable from *Summers v. Summers* (*j*), and characterizes the testator's act as "an obvious blunder."

We think one would hazard little in expressing the opinion that to anyone other than a lawyer the above decision would appear to be a most righteous judgment, and yet, from the lawyer's standpoint, it would seem to be incapable of support on the approved line of authorities. One need have the less hesitation in expressing that view, inasmuch as the learned Chancellor, on being again confronted by the same point in a contested case, which we are about to mention, himself expressed a doubt whether *Re Shaver* was supportable on the cases.

(*i*) The learned Chancellor does not cite authorities on this point, but if it is desired to refer to such, the following may be consulted:—*1 Jarm. on Wills* (5th ed.) 480; *Boon v. Conforth*, 2 Ves. 277; *Coryton v. Helyar*, 2 Cox 340; *Doe v. Stinlake*, 12 East 515; *Doe v. Thomas*, 3 Ad. & El. 123; *Smith v. Pybus*, 9 Ves. 566; *Smith v. Crabtree*, 6 Ch. D. 591; *Hanbury v. Tyrell*, 21 Beav. 322; *Campbell v. Bonskell*, 27 Beav. 325; *Jones v. Price*, 11 Sim. 557; *Aspinall v. Andus*, 7 M. & G. 912; *Luun v. Osborne*, 7 Sim. 56; *Towns v. Wentworth*, 11 Moo. P. C. 545; *Hugo v. Williams*, L. R. 14 Eq. 224. It is also equally well laid down that the Court will supply words that have obviously been unintentionally omitted by the testator so as to effectuate his intention as indicated by the context: *Re Morony*, L. R. 1 Ir. 483; *Doe v. Turner*, 2 D. & R. 398; *Abbott v. Middleton*, 7 H. L. Cas. 68; *Atkins v. Atkins*, Cro. El. 248; *Spalding v. Spalding*, Cro. Car. 185; *Sheppard v. Lessingham*, Ambl. 122; *Radford v. Radford*, 1 Keen 486; *Hope v. Potter*, 3 K. & J. 209; *Greenwood v. Greenwood*, 5 Ch. D. 954.

(*j*) 5 O. R. 110.

In illustration of the rigid doctrine, the case of *Hickey v. Stover* (*k*) naturally comes to be considered. In that case the circumstances were to all intents and purposes the same as in *Re Shaver*, *supra*, while the decision was diametrically opposite. The testatrix devised the south quarter of lot 20, Con. 9, Township of R., to T. L., and the east quarter to her two daughters. It was sought to show that she had at the time of her death no other land than the south half of lot 20, Con. 8, of R., and to make the will operate to pass that to T. L.: "Held, that the devise being in its terms free from ambiguity, the Judge below was right in rejecting evidence of extrinsic facts, and that even if it might have been shown that lot 20 in Con. 8 was the only land which the testatrix owned the will could not operate to pass it." This case came in the first instance before the learned Judge who tried the case commented on in this article, who has perhaps done more to elucidate and settle the law on this subject than any other single Judge upon our Bench (*l*). It was afterwards reviewed and affirmed by the Divisional Court (Boyd, C., and Proudfoot, J.). The following citations from the judgment of Boyd, C., will serve to show the line of argument and the reasons for the decision. After quoting the words of the devise the learned Chancellor says, p. 112: "The devise is in its terms free from all ambiguity; it is not inherently absurd or insensible; it is not inconsistent with any context. The maxim pertinent to such a case is *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verbis expressa fienda est*," Co. Litt., 147 a. "There is one single specific description of a particular lot of land, whether owned by the testatrix or not now appears to me to be a fact immaterial." The learned Chancellor then refers to the rule exemplified in *Doe Lowry v. Grant*, *supra*, and points out that neither that rule nor the one laid down in *Hardwick v. Hardwick*, *supra*, can aid in the present case, and proceeds, "There

(*k*) 11 O. R. 106.

(*l*) The following cases upon the subject, among others, were before Mr. Justice Ferguson:—*Saunders v. Breakie*, 5 O. R. 603; *Summers v. Summers*, 6 O. R. 110; *Wright v. Collings*, 16 O. R. 182; *Hickey v. Stover*, 11 O. R. 106; *Re Bain & Leslie*, 24 O. R. 136.

is no conflict upon different parts of the description of what is devised; the description is single, and relates to a defined lot without any modifying or qualifying or assisting words to ascertain what is meant. Assume that oral testimony would disclose that the lot described in the will was not owned by the testatrix, but that a lot of the same number in an adjoining concession was owned by her, what result properly follows? If you may relate the erroneous concession, and if you have a sufficient description left, the will may pass the land; the description left (after rejecting the concession) would be a devise of the south quarter of lot 20 in the Township of Raleigh to the son, and of the east quarter of the same lot to the daughters. Is that a sufficiently precise description of the lot? Is there any right to reject the concession stated in the will? My difficulties begin with the first step. What right is there to reject the concession stated in the will? It is not enough to say that she owned no land in that place. Such variance between the lot she owns and the lot she names in the will is not an instance of latent ambiguity or equivocation: she owns one thing: she devises another thing: evidence is not admissible to show that these are identical, or that the one means the other for the purposes of the will. The only such case in which extrinsic evidence is to be received is when the description, in all its parts, is equally applicable to two things: Cairns, L. C., in *Charter v. Charter*, L. R. 7 H. L. at p. 377. Difficulties appear to multiply with the next step. If by the effect of extrinsic evidence we render uncertain that which on the face of the will is certain, then we create an unnecessary ambiguity, and to remedy this we need further evidence to clear up the uncertainty. Having eliminated the concession as erroneous, we have to determine which lot is the one devised. There are, I suppose, a dozen or more lots numbered twenty in the Township of Raleigh; which is it to be? From the language in the will, if that is to be alone regarded, you cannot determine. If, going outside the will, you introduce the assumption that the testatrix meant to devise her own land, then you can arrive at certainty on the principle, *id certum est*, etc. It is clear that no evidence of the testa-

trix's intention, or of circumstances to indicate intention, can be given to explain the will, when it embodies no latent ambiguity. If not, I do not see how any assumption can be legitimately made that this testatrix intended to devise the land she lived on or owned. She may have thought that she had an interest in the lot actually named in the will, or she may have intended to procure that lot and devised it in anticipation of such acquisition. All evidence on these heads is shut out, so that as a general rule, it would be unsafe to conjecture what she meant. The rule must be *non quod voluit sed quod dixit*. It does not necessarily or infallibly follow that having but one lot, she intended to devise that one. The conjecture that she so intended may be so strong as to fall little short of certainty; but that little involves a doubt which cannot be solved by judicial inference. If the testatrix had said: I devise my lot, being No. 20 in the 9th Concession of Raleigh, then there would be something in the will itself to correct by. There would then practically be two descriptions, i.e., her lot No. 20 in Raleigh, and her lot in the 9th Concession. You could then prove *ab extra* that the 9th Concession was an erroneous designation, and one that did not square with the rest of the description: *Welby v. Welby*, 2 V. & B. 191. This would be a case of *falsa demonstratio*, for enough would be left to render the will operative as to the particular land intended and defined." The learned Chancellor then adds, "I am inclined to think that I went too far in *Re Shaver*, but sitting here in Divisional Court I am not bound by it."

These references illustrate sufficiently the fundamental difference between the two doctrines as well as the lines of reasoning in support. The cases on the subject, both Canadian and English, are very numerous, but need not be further referred to here (*m*).

(*m*) Should it be desired to examine the cases, the following may be referred to:—Canadian—*Doe d. Lowry v. Grant*, 7 U. C. R. 125; *Buchner v. Buchner*, 6 C. P. 314; *Campbell v. Campbell*, 14 U. C. R. 17; *Doe d. Taylor v. Peterson*, 3 O. S. 497; *Ex parte Lyons*, 2 Ch. Ch. 357; *Kean v. Drope*, 35 U. C. R. 421; *Holtby v. Wilkinson*, 28 Gr. 550; *Saunders v. Breakie*, 5 O. R. 603; *Summers v. Summers*, 5 O. R. 110; *Re Shaver*, 6 O. R. 312; *Hickey v. Stover*, 11 O. R. 106; *Young v. Purvis*, 11 O. R. 597; *Hatton v. Bertram*, 13 O. R. 766; *Potts v. Boivine*, 16 A. R. 191; *Wright v. Collings*, 16 O. R. 182; *Hickey v.*

In England, the question very frequently presents itself in a different form. Land there not being divided into townships, concessions and lots, in the manner in vogue in Ontario, testators constantly devise their estates by some distinctive name, as "The Cleeve Court Estate" (*n*), "My Quendon Hall Estates" (*o*), "Colt's Foot Farm" (*p*), "Britton Ferry Estate" (*q*), "The Dyffydd" (*r*). In such cases, the very name used by the testator requires the admission of extrinsic evidence to show what is included under it. With us, on the contrary, the usual and natural description is such and such a part of lot       , in the        Concession of the Township of       , a description which, though it may be erroneous as to the land intended, is almost certain to fit with absolute accuracy an existent parcel of land, rendering extrinsic evidence, in the absence of additional words importing ownership, absolutely inadmissible.

The latest Canadian case on the subject is *Doyle v. Nagle*, supra, in which judgment was delivered in March last. In it, our highest Ontario Court unanimously approves the rule governing *Doe d. Lowry v. Grant*. The case also, incidentally, and as far as it goes, approves the law as stated in the propositions above enunciated.

*Hickey*, 20 O. R. 371; *Scanlon v. Scanlon*, 22 O. R. 91; *Re Bain & Leslie*, 24 O. R. 136; *May v. Logie*, 23 A. R. 785; *Doyle v. Nagle*, 24 A. R. 162. English—*Re Chapman*, 8 Jur. 902; *Miller v. Traviss*, 8 Bing. 244; *Doe dem. Humphreys v. Roberts*, 5 B. & Ald. 407; 2 Bulstrode 174; *Doe d. Beach v. Earl of Jersey*, 1 B. & Ald. 550; *Doe d. Templeton v. Martin*, 4 B. & Ad. 771, 785; *Sanford v. Raikes*, 1 Mer. 646; *Doe d. Chichester v. Oxenden*, 3 Taunt. 147; 4 Dow. 65; *Webber v. Stanley*, 16 C. B. N. S. 698; *Smith v. Ridgway*, L. R. 1 Ex. 331; *Webb v. Byng*, 1 K. & J. 580; *In re Bright-Smith*, *Bright-Smith v. Bright-Smith*, 31 Ch. D. 314; *Barber v. Wood*, 4 Ch. D. 885; *Doe v. Brown*, 11 East 441; *Pogson v. Thomas*, 6 Bing. N. C. 337; *Stanley v. Stanley*, 2 J. & H. 491; *Hardwick v. Hardwick*, L. R. 16 Eq. 175; *Charter v. Charter*, L. R. 7 H. L. 377; *Smith v. Maitland*, 1 Ves. Jr. 362; *Chambers v. Minchin*, 4 Ves. 675, and note; *Doe v. Westlake*, 4 B. & Ald. 57; *Newburg v. Newburg*, 5 Madd. 364; *Clementson v. Gandy*, 1 Keen 309; *Box v. Barrett*, L. R. 3 Eq. 244; *Moser v. Platt*, 14 Sim. 95; *Bleakley v. Smith*, 11 Sim. 150; *Shardlow v. Cotterell*, L. R. 20 Ch. D. 9; *Re Harrison*, *Turner v. Hellard*, 30 Ch. D. 390.

(*n*) *Castle v. Fox*, 11 Eq. 542.

(*o*) *Webb v. Byng*, supra.

(*p*) *Down v. Down*, J. B. Moo. 80; 7 Taunt. 343.

(*q*) *Doe d. Beach v. Earl of Jersey*, 1 B. & Ald. 550.

(*r*) *Pedley v. Dodds*, L. R. 2 Eq. 819.

Referring to the rule in *Doe d. Lowry v. Grant*, the present Chief Justice of the Court of Appeal says: "That decision has remained unreversed for nearly half a century, and should as a rule of property be now followed, even if we were not altogether satisfied of its soundness."

We have said that the case commented on in this article would seem difficult of reconciliation with the decided cases. It seems to us that the application of the rule in the *Lowry* case would have solved the difficulty presented in consonance with the authorities. The will in the *McFadyen* case contains the necessary words (s) to admit of the application of that rule. That admits extrinsic evidence. By the light of that evidence it appears that the testator did not own the hundred acres he purports to devise, but did own one hundred acres of the same lot, and that he owned no other land. Applying the rule, the mistake made by the testator is made patent, and the testator's own land identified as the subject of the devise. Having reached that stage in the process, the remaining difficulties at once disappear. The hundred acres in question being identified, there can be no possible doubt as to either the persons who are to take it, or the manner in which they are to share it. The will is explicit on both these points. The persons to take are the two sons *Hector Allen* and *Laughlin*, and the estates taken are the south and north halves respectively, in severalty, of the hundred acres owned by the testator. The learned Judge remarks that the testator's intention "to give all his lands to these two devisees is manifest," but is not his intention equally manifest that—whatever land it may be that he is giving to them—these devisees should take each his own fifty acres in severalty? The case as it stands seems almost to involve the approbation and reprobation of the rule in the *Lowry* case, at the same time, while it certainly introduces a new complication into the authorities on the subject, already sufficiently lacking in harmony. At the same time, although the chain of reasoning indicated seems to us unimpeachable,

(s) *Viz.*, a declaration of intention to devise his (the testator's) property.



we confess that, in view of the pronouncement of the learned Judge upon the subject, we advance the view above mentioned with the greatest possible diffidence.

It should be remarked, moreover, that the main question submitted for determination in the case was whether the two devisees took the whole of the land to the exclusion of the heirs, and that the learned Judge was given to understand that they were on entirely amicable terms, and if the main point were decided in their favour, would have no difficulty in arranging between themselves as to the estate to be taken by each. Accordingly the learned Judge, in holding that they took 50 acres out of the 100 as tenants in common, remarks: "This, however, may not be material here . . . each of them can make an appropriate conveyance to the other," etc.

We have also taken exception to the present state of the law upon the subject. To the writer it seems to be unreasonable to a degree, and to hinge upon a distinction in the last degree artificial and illogical, so much so, that to a layman it would seem to shock common sense. Let us put the matter in its plainest form:—A., owning the south-east quarter of lot 1 in Concession 2 of the Township of \_\_\_\_\_, and no other land, makes a will in the following words: "I devise the south-west quarter of lot 1 in Concession 2, in the Township of \_\_\_\_\_, to X." (by mistake calling the land the south-west quarter of the lot). B., owning the south-east quarter of lot 3 in Concession 4 of the Township of \_\_\_\_\_, and no other land, makes a will in the following words: "I devise my farm, being the south-west quarter of lot 3 in Concession 4, in the Township of \_\_\_\_\_, to Y." (making a similar mistake in the description). As the law stands at present, the first mentioned will is inoperative; the attempted disposition of the land falls to the ground, and there is an intestacy. As regards this will, the Courts are powerless to afford any relief by correcting the mistake. In the case of the second will the devise is perfectly valid. The Courts have no difficulty in correcting the mistake made.

It will be observed that the only difference between the two cases is that, in the latter, the testator uses



words importing that he is devising property that he then owns; in the former there is the mere bald devise of certain land. To a layman it would no doubt appear that there was literally no difference between the two cases. He would take it to be an absolute matter of course that when a man sits down to make his will, he intends to dispose of his own property, and would regard a declaration to that effect introduced into the will to be a mere waste of words (*t*). To tell him that the slight difference in wording above indicated entailed such momentous legal consequences would not be to increase his respect for the law. The Judges, too, while very properly following the law as they find it laid down in the cases, do so with reluctance; expressions constantly escaping them showing that while constrained to act according to the authorities, they are fully sensible that in this instance law and "justice and good sense" do not run parallel.

If it might be legitimately presumed that every testator when making his will means to deal with his own property, and not somebody else's, then the anomaly complained of would disappear and the law would be brought into harmony with the justice of the case. It is precisely the inability of the Courts under the law as it now stands to make that presumption, that gives rise to the state of affairs commented on. That the presumption is a reasonable one will scarcely be denied by layman or lawyer. It is quite true that it is conceivable that a

(*t*) Nor would the laymen be alone in this view. It has been conceded by the Bench time and again that this presumption, though clearly not admissible, would assuredly be an extremely reasonable one. Mr. Justice Ferguson, for instance, in *re Bain & Leslie*, *supra*, says:—"It is beyond question the intention of every or almost every testator to dispose of his worldly property." The late Chief Justice Robinson too, in *Doe d. Lowry v. Grant*, *supra*, says:—"The testator merely announces in the beginning of his will an intention to bequeath all his real property, not an intention to give it to any one in particular, but that general intention to leave nothing undisposed of which is usually expressed by way of introduction, and which we may suppose actuates every testator when he sits down to make his will." In the Courts, both in England and the United States, it is recognized as a natural and reasonable assumption, that when a testator makes a will he does not intend to die intestate as to any part of his property: *Re Harrison*, *Turner v. Hellard*, 30 Ch. D. 390; *Leigh v. Savidge*, 14 N. J. Eq. 124; *Doe v. Latham*, Busb. (N. Car.) 365; *Apple v. Allen*, 3 Jones Eq. (N. Car.) 120; *Gilpin v. Williams*, 17 Ohio St. 396; *Jarnagin v. Conway*, 2 Humph. (Tenn.) 50; *Dole v. Johnson*, 3 Allen (Mass.) 364.

testator should deliberately devise a piece of land with full knowledge that he did not, at the time, own the same, but with the intention of purchasing it, and if, in such a case, the Courts imported into the interpretation of the will the presumption above mentioned, and substituted for the property so devised another parcel of the testator's estate, on the ground that the latter must have been the intended subject of the devise, they would be doing the testator an injustice, and in effect making a new will for him. It is on grounds of this nature that the Courts refuse to admit the presumption mentioned, or to interfere in cases like *Hickey v. Stover*, supra. It will be generally conceded, however, that such a case is of extremely rare occurrence.

It would be a serious error to suppose that the matter commented on is a mere point of dry law of little practical moment to the community. On the contrary, it is eminently a practical question. It is not too much to say that the law on this subject, in its present condition, is a constant menace to property owners throughout the Province, a pit-fall for unwary testators. The danger is very much more imminent here than in England, on account of our division of land into lots, concessions, etc., as above pointed out. It is not safe to act upon a proposed description unless the deed is actually produced. Even where the will is drawn by a lawyer, the danger is not entirely evaded. It is undoubtedly the case that the same accuracy of description of "the parcels" is not, as a rule, insisted upon in the case of wills as in the case of deeds; the prevalent impression that a sufficient description to identify is all that is required, and that the Court will take care of the testator and see that his intention is not defeated, being responsible for not a few careless or unverified descriptions in the former.

Consider, moreover, how many wills are made by non-professional draughtsmen, to whom, even where the testator is not in extremis, it rarely, we think, occurs to require the production of deeds or stoop to accuracy of description, and it becomes a matter for wonder that the cases of error in description that find their way into the Courts are not multiplied tenfold. The evil being admitted

(for we think it must be admitted) to exist, let us consider the remedy, if any.

From what has been said, it will appear that the difficulty in dealing with cases of this kind lies in the fact that, although the legal rules governing the interpretation of wills are entirely rational, intelligible and well settled, the hands of the Judges in applying them to individual cases are either fettered or free according to the caprice of the testator in wording his will. Can any remedy be proposed that will free the hands of the Judges in granting relief, without at the same time exercising a disturbing influence on the present well understood rules of interpretation? Probably most lawyers will agree with us that nothing is much more objectionable than statutory tinkering with established law; so that if any remedy can be suggested, it will, it seems to us, be the more acceptable if it leave the present rules of construction unimpaired. There would no doubt be different ways of effecting the end in view. We shall not presume to do more than offer a suggestion. To us it seems that if the legislative authorities felt disposed to deal with the matter, the preferable method of procedure would be to abstain from interfering in any way with the law or authorities as they at present stand, and direct attention solely to the wills themselves. We think a short enactment to the following effect would answer the purposes, viz.: "Unless an intention to the contrary therein appears, all wills shall be construed as though the subject of every devise or bequest therein contained were immediately preceded by the words, 'my property, being,' or words to the like effect."

A provision of this kind, preceded by an appropriate preamble indicating the evil to be removed, would, we think, cover the whole ground, and effect a very radical improvement in the law in its application to this subject. The adoption of this would seem to us to be attended by the advantage that each individual case would rest upon its own circumstances, and it would remain with the Court to determine whether it was or was not a proper case for affording the relief asked.

F. P. BETTS.

## EDITORIAL REVIEW.

**Sunday Laws.**

The absurdity of trying to enforce laws respecting Sunday observance, however satisfactory it may be to keep them on the statute book for other purposes, is shown by *Williams v. Wright*, 13 Times L. R. 551. The Act 21 Geo. III. c. 49, imposes a penalty for advertising a Sunday evening concert. The advertisement appeared in *The Times*, and after stating the time, place and programme, announced, "Tickets, 1s., 2s., 3s. and 5s." The plaintiff bought a ticket, which had printed thereon, "Admission free. Reserved seat, 1s." He said in evidence that he was not in favour of the Act, and did not want to restrict rational pleasure on Sunday. But it may be assumed, from his bringing the action, that he was in favour of taking the penalty of £50 if he could recover it. The action was dismissed.

The most absurd feature of the whole proceeding was the fact that this plaintiff, who desired to enforce the law for his own personal profit, had no religious belief whatever, and refused to take the oath on that ground when he went into the witness box. The recital of the Act shows that it is directed against the "encouragement of irreligion and profaneness," and it is a grim bit of satire that its enforcement should have been sought by an irreligious person, and made the attempted means of profit to himself.

Little less absurd, in another sense and from another point of view, is the reasoning which enabled the learned Judge to discourage irreligion in the plaintiff by dismissing his action. The ticket declared admission to be free, but that 1s. was to be paid for a reserved seat. The Act referred only to the advertisement of public entertainments "to which persons are to be admitted by the payment of money." Charging for a seat was held not to be incompatible with free admission. So the action failed.

It would be better not to have such legislation on the statute book, than to keep it there with such results.

## CORRESPONDENCE.

**Our Municipal Act.**

*To the Editor of THE CANADIAN LAW TIMES.*

Sir,—Any criticism of the language of these Acts hardly possesses the merit of originality ; as, year by year, we have the protests of judges, lawyers and municipal officers, elicited by the carelessness and ignorance displayed in the preparation of their various amendments, or prompted by their wonderful fertility, each section of the original Act being but a seed bearing other sections, seemingly with all the fecundity of a luxuriant vegetation. Despite these protests, our Legislature calmly turns out its annual product, not one whit more elegant, clearer, more accurate or more systematic than its previous efforts; but differing from them only in that it is greater in volume, because it not only has to perpetrate its annual list of crimes against method and accuracy for the current year, but it has, in its own peculiar fashion, to correct or modify those which it has committed in the always accumulating “amendments” and “improvements” it has previously made.

The year 1897, being the occasion of the quinquennial consolidation of the Municipal Acts, and also of the periodical general consolidation, has been the *raison d'être* of a masterpiece of municipal legislation, and it is a recent perusal of this latest collection of municipal amendments that has wrung from the writer this humble remonstrance.

Since the consolidation in 1887 the Annual Municipal Amendment Act has been as constant a feature of our yearly statute books as the voting of supplies. Down to and including 1896 there have been since 1887 about five hundred and fifty amendments or additions. Some pains has been taken to count these, and, if anything,

the estimate furnished is conservative; for, two or three amendments being frequently provided for by one section, some one or more may easily be overlooked. In 1897 some 250 clauses, sub-sections and articles were added, or amendments and changes made, thus making a grand total of 800 amendments or additions in ten years. A number of these amendments are simply corrections of clerical errors, which are of all kinds, such as mistakes in grammar, use of entirely wrong words, redundancy, ambiguity, typographical errors, and the expression of one thing when another is meant. No criticism is here offered of difficulties of construction or obscurities, other than those of the most glaring description, if obscurity can ever glare; the metaphor is due to too close and recent a study of municipal literature. The curious may refer to such cases as *Reg. ex rel. Masson v. Butler*, 17 P. R. 382, for instances of this excepted class. This indictment is only directed against such blunders in printing, grammar and method as might be expected to attract the attention and shock the intelligence of an average school boy. The statutes for the present year surpass all others in these respects. The amendments are to be found in Schedule C of the Statutes Amendment Act, cap. 15, and in the Municipal Amendment Act, 1897, cap. 45. The first contains 143 clauses, of which 128 relate to municipal matters; the latter contains some 85 sections, of which 61 amend or relate to the Municipal Act itself. Then in the same year we have an Act to amend the Municipal Arbitration Act, an Act respecting a short form of certain municipal by-laws, and an Act to provide for auditing municipal and school accounts. Some attempt has been made in parts of chapter 45 to proceed with these amendments in a systematic manner, namely, to amend or repeal an earlier section before dealing with a later one, but even the spasmodic efforts made seem to have early exhausted the energy of the draughtsmen, for they were soon amended. The monotony of an even attempted numerical order is also further relieved by the occasional insertion of an addition to the statute without reference to any section, division or heading in the

original Acts, thus providing for the grateful student all the excitement of himself finding a suitable resting-place for the unfortunate waif within the borders of its native Act. This latter statute also includes under its title the "Municipal Amendment Act," amendments to such well-recognized divisions of municipal law as the Assessment Act, the Act respecting Pounds, the Railway Accidents Act, the Act to impose a tax on dogs and for protection of sheep, and the Act for preventing the spread of contagious diseases amongst animals, most of which in former years had been accorded the honour of separate chapters, an honour which had a basis of reason, inasmuch as, historically, assessment statute law has been found in a separate chapter for many years, and there is a separate chapter for it in the current volume, while railway accidents, the protection of sheep and the contagious diseases of animals, do not immediately suggest themselves to the ordinary mind as branches of municipal law.

The principle upon which some amendments have been assigned to Schedule C of chapter 15, while others appear in chapter 45, is difficult to discover, perhaps owing to the fact that no principle exists. One explanation that is hazarded is that minor changes, the clearing up of ambiguities and correction of clerical errors, were assigned to the former, while more important changes in practice or principle were embodied in chapter 45. It is frankly admitted that this is only a surmise, while, practically, the thought sometimes suggests itself that the compilers of the one were in ignorance of the existence of the other. The fact that the later Act is to come into force some six months earlier than the other may have been the reason why some provisions appear in one and some in the other, but there is rarely anything in the changes themselves to make the necessity for this apparent. Some sections of the Consolidated Statutes have been amended by both Acts, such as section 116, and sub-section 3 of section 332, and at times the result is rather ludicrous. For instance, in sub-section 4 of section 352, it was provided that, "notwithstanding any want of substance or form," certain by-



laws respecting assessments should be absolutely valid and binding. This was passed in 1891, and carried in that form into the consolidation in 1892. By 1897, however, our draughtsmen seem to have realized the difficulty of holding a by-law to be valid and binding when it might be entirely lacking in substance and form, that is non-existent, and so they hastened to change the word "want" to "defect," which was an improvement. This change appears as clause 67, Schedule C, of chapter 15, and is to come into effect on December 31st, 1897; at least so one would conclude. The other branch of draughtsmen decide otherwise, however, and by section 4 of chapter 45, which came into effect on July 1st, the sub-section is absolutely repealed. We have at least the satisfaction of knowing that after six long years this provision might have been grammatical and intelligent had not its existence been so abruptly terminated. But our satisfaction is not much increased when we find by section 5 of chapter 45, 1897, that a new section has been added as 352 (a), in which we again find that, "notwithstanding any want of substance or form," certain by-laws respecting assessments should be absolutely valid and binding. What can be said of work such as this? The mistake in 1891 may have been and probably was the result of stupidity only, but in 1897 there must surely be a large proportion of carelessness in addition. There is not room to multiply instances, but the editor's indulgence is asked while two more are furnished; if other examples are required the writer will be happy to give them.

In 1896 the Legislature desired to pass a provision applicable to cities having at least 100,000 inhabitants; at least that is the inference to be gathered from later legislation. With customary intelligence, however, we find that these provisions (sections 30 and 31 of 59 Vict. c. 51) refer to "cities of over 100,000 inhabitants." We therefore cannot rely in a close case upon a census in round numbers, but must see that at least 100,001 people dwell therein. The authors of Schedule C next year saw this, so, by clause 122, they amended these sections by making them applicable to cities having a population



of 100,000 or over. Section 31 must share the lot, however, of so many other sections in this unhappy statute and must undergo other changes. These were made by section 22 of chapter 45, and were not entrusted to the compilers of the schedule. Section 22 repeals the original section, the one that would in January, 1898, apply to cities having a population of 100,000 or over, and substitutes an altered section, which again applies only to cities containing more than 100,000 inhabitants.

Round numbers were again rendered valueless, and another citizen might again have to be imported to set the Act in motion; but this catastrophe is finally happily averted by a general clause (chapter 45, section 59), providing that in all sections where "over" or "upwards of," etc., a specified population is required, the same shall be read as relating to a city having a population equal to the number specified. This, while an utterly useless and redundant provision in a score of cases where in the same year the amendment has been specifically made, has at least the effect in section 31 of finally bringing the will of the Legislature and its expression into harmony. True, the method of doing so seems interesting rather than sagacious, but that is a detail.

Let us now glance at the vicissitudes and present position of section 351 of the Consolidated Statute. This provides for the registration of certain municipal by-laws in the manner there specified. In its original state it enacted that it should be "registered" by the clerk of the municipality, leaving it open to the argument that the clerk must himself make the journey to the office to register it. It also enacted that in the case of a county by-law the registration should be made "in the registry office for the county in which the county town is situate." Nothing seems simpler than this until we reflect that there are sometimes two or three registry offices "in the county in which the county town is situate," any one or all of which might fairly claim the privilege of registration. This state of affairs having existed for many years, it finally dawned on the Legislature that it

required amendment, and the amendment was accordingly proceeded with. Several changes being required, a simple and neat course, and one frequently adopted by Parliament, in spite of its simplicity and neatness, would have been to repeal the section and substitute a new one containing the desired improvements; this might not be, however. Though there are only nine lines in the section, and five amendments must be made and five sub-sections added, yet the original section is in this case allowed to stand as a framework on which Parliament is to weave its intricate design.

First, by section 7, sub-section 1, the word "four" in the last line but one is changed to "two." Having done this, section 47 must deal with it. The clerk is relieved from the necessity of registering, and may now transmit the by-law; then the words in line six, "in the registry office for the county," are struck out, and the words "to the registrar of the registry division" replace them; the words "in the registry office," in lines seven and eight, are to read "to the registrar"; then the words "the county," in the sixth line, are struck out, and the words "the registry division" substituted; this, at least, is what would take place did such words exist in the sixth line, but they do not, they were struck out by the same amending section, and appear only in lines six and seven. By striking the latter out and replacing them by the substituted words, we have an utterly senseless provision reading in part as follows: "Shall be transmitted by the clerk of the municipality, if a county, to the registrar of the registry division in which the registry division town is situate," etc. Finally, by the same amending section, five sub-sections are added to this mutilated instance of somebody's blundering, so that by two widely separated clauses in the same Act, passed largely to rectify a blunder, we have at last a clumsy and in part utterly senseless provision. *Par-turiunt montes; nascetur ridiculus mus.*

It would be a poor return for your courtesy to fill more space with other examples, though there abound many instances of the stupidity and carelessness, which are more or less ridiculous in themselves, but which,

being in relation to property and civil rights, might so seriously affect important interests of large classes of people as to make it difficult to find in their unconscious humour an excuse for their clumsy draughtsmen.

Yours, etc.,

SHIRLEY DENISON.

Toronto, July 31st, 1897.

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**Bicycles and Legislation.**

*To the Editor of THE CANADIAN LAW TIMES:*

Sir,—In addition to the defects in the legislation of last session respecting bicycles on highways, which you point out in your review of Ontario legislation, allow me to point out several that suggest themselves to me as the direct result of the Act passed last session.

Before that Act was passed, as you point out, either there was no rule of the road for bicycles, or else the Highways Act governed them. The latter view was the prevailing one. But, by the late legislation, though a special rule is now laid down for the regulation of bicycles when meeting other vehicles, you have omitted to point out that there is no rule for the guidance of wheelmen when meeting or overtaking each other. Thus, sub-section 1a provides for a person in charge of a bicycle or tricycle meeting a person in charge of a vehicle drawn by horses; sub-section 1b, for the case of a bicycle or tricycle overtaking a vehicle drawn by horses, or a person travelling on foot; sub-section 1c, for the case of a bicycle or tricycle being overtaken by a vehicle drawn by horses, etc. No provision is made at all for the case of one wheelman meeting or overtaking another. The first section of the original Act cannot be invoked now, as it perhaps could have been before, because of the special rules laid down by the new legislation for bicycles and tricycles, which show that the old legislation was not intended to apply.

Again, horseless carriages, or motor carriages, are most probably in the near future to be a common mode of conveyance. The Legislature, by dealing with one species of them (bicycles), has intimated its opinion that others are not within the Act, but will be dealt with as the occasions arise. It certainly seems to me that if a little common sense had prevailed, one general, uniform rule of the road for all vehicles, however propelled, would have been better than special rules which, on account of their being special, necessarily exclude many cases which would have been provided for by a general rule.

Yours, etc.,

WHEELMAN.

[We plead guilty to the omission. The point on its face seems a good one. But we must refer "Wheelman" to the Act of last session, cap. 2, sec. 9, under which the Court might hold that the cases referred to fell under the old law.—Ed. C. L. T.]

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# THE CANADIAN LAW TIMES.

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OCTOBER, 1897.

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## DECEIT AND ESTOPPEL.

**M**ISREPRESENTATION may, with regard to its civil punishment, be considered under four aspects:

1. As giving rise to an action of deceit.
  2. As being a breach of duty, and, therefore, giving rise to an action of negligence.
  3. As giving rise to a bill in equity for restitution.
- And,
4. As giving rise to an estoppel.

1. *Actions of Deceit.*—Ever since *Pasley v. Freeman* (a), courts of law have been familiar with actions of deceit, based upon misrepresentation; for example, a misrepresentation as to the financial ability of a third person, whereby the plaintiff is induced to give credit, and thus to suffer damage.

2. *Actions of Negligence.*—It is not usually said that, for misrepresentation, an action of negligence will lie; but a moment's reflection will show that such must be the case. Negligence must not, loosely, be thought of as mere carelessness; but, more accurately, as the neglect, or disregard, of some legal duty. Now, it is agreed, that "an action for deceit will lie when the defendant has, by a fraudulent misrepresentation, induced another to act, and so acting he has been injured, or damnified." But, clearly, there is implied in that statement an assertion that "a fraudulent misrepresentation," which has "induced," etc., is a breach of legal duty. If it be not, then we must say that such a fraudulent misrepresentation

(a) 3 T. R. 51 (1789), and see Pollock on Torts, 236 ff.

is perfectly right (so far as the law is concerned); that there is in it no breach of legal duty, and yet that the law (in an action of deceit) will punish it in damages! Misrepresentation, then, to be actionable must be in breach of legal duty, and, therefore, must be actionable as such. But this is merely saying, that for misrepresentation an action will lie as for breach of duty; that is, that an action of negligence will lie.

It would seem, therefore, that an action of deceit is nothing but a form of the action of negligence (a form in which the allegation of duty is implied), and that wherever deceit will lie, a count in negligence is as appropriate as a count in deceit.

3. *Restitution*.—Courts of Equity always exercised jurisdiction in cases of fraud. And two years after *Pasley v. Freeman* (above referred to) had been decided, it was said (b) that that case, “and all others of that class, were more fit for a Court of Equity, than a Court of Law.”

*Pasley v. Freeman* was, nevertheless, a case in which the remedy seemed to be peculiarly in damages: “You misrepresented the financial ability of my debtor; on the faith of your misrepresentation, I gave him credit; pay me the damages which I have sustained.” Courts of Equity were not accustomed to award “damages.” The word implied legal, rather than equitable, jurisdiction. But the word could be changed, and the reality veiled; so, instead of “damages,” the Court of Equity decreed “restitution”; and “breach of duty” gave way to a sort of performance of the representation:—“Because of your misrepresentation, I have lost so much money; I have an equity—not an action—against you, to make the representation good—not to pay me damages for my loss, but, by making the representation good, to keep me free from loss. Thus, referring to *Pasley v. Freeman*, Lord Eldon said (c):

“It has occurred to me that that case, upon the principles of many decisions in this Court, might have been

(b) *Evans v. Bicknell*, 6 Ves. 174, (1801); and see *Burrows v. Lock* 10 Ves. 474 (1805).

(c) *Ib.*

maintained here; for it is a very old head of Equity, that if a representation is made to another person, going to deal, in a matter of interest, upon the faith of that representation, the former shall make that representation good if he knows it to be false."

In later years the subtlety of this excuse for equitable jurisdiction was, to some extent, lost sight of. For example, in a case (*d*) in which directors of a company were being sued, in equity, for a misrepresentation, upon the faith of which the plaintiff had taken certain shares, Lord Chelmsford said:—

"This case is entirely different from suits either to be relieved from, or for the enforcement of, contracts induced by the fraudulent concealment of facts, which ought to have been disclosed; nor does it resemble such cases as *Burrows v. Lock* (10 Ves. 470), and *Slim v. Croucher* (1 DeG. F. & J. 518), where a person making an untrue representation to another, about to deal, in a matter of interest, upon the faith of that representation, has been compelled to make good his representation, whether he knew it to be false, or made it through forgetfulness of the fact. It is a suit instituted to recover damages from the respondents for the injury the appellant has sustained by having been deceived, and misled, by their misrepresentation, and suppression of facts, to become a shareholder in the proposed company, of which they were the promoters. It is precisely analogous to the common law action for deceit. There can be no doubt that equity exercised a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail, both at law and in equity."

4. *Estoppel*.—Misrepresentation, acted upon, may also give rise to an estoppel, as is sufficiently well known. In this case, too (as in deceit and negligence), there must be some breach of duty in making the representation. Were it otherwise, we would have, again, to say, that the misrepresenter did perfectly right; and it would, therefore, be impossible to pursue him with punishment, or with punitive consequences. Estoppel is so

(*d*) *Peek v. Gurney*, L. R. 6 H. L. 390; 43 L. J. Ch. 19 (1875).

nearly allied to deceit that Baron Parke in one of the leading cases (e) said:—

“I think you will find that the person who makes a statement on which another alters his position, is not estopped, unless he so induces the latter to alter his position, that the former would be responsible to him, in an action for it.”

*Various Remedies in Same Case.*—Let it, then, be observed that the same misrepresentation may give rise to an action in deceit, or in negligence, to a claim for restitution, and to an estoppel. For example, an intending mortgagee of a fund inquires of the trustee of it, as to encumbrances, and is fraudulently told that there are none; whereas, in fact, the fund has already been charged. The mortgagee may now sue the trustee for damages, or for restitution; or, aided by estoppel, he may require the trustee to hand over the fund. In the last alternative, the trustee's only possible defence is that the fund has already been charged; and this defence he is precluded from setting up, because of the misrepresentation (f).

*But Conditions Diverse.*—There being, then, these various remedies for misrepresentation, one would naturally be led to think that the conditions, or requisites, of the misrepresentation, would, for the application of each of them, be identical. More particularly one would say, that, whatever distinction there might be between deceit and negligence, at law, on the one hand, and restitution, in equity, on the other; yet there could be no very marked variance as between restitution in equity and estoppel—which was, in its origin, an equitable doctrine.

Such is not the present state of the law. On the contrary, the authorities seem to leave no room for escape from the embarrassing conclusion that, for deceit, and negligence, there must be, but for estoppel there need not be, *mala fides*; while, for restitution—well, we shall see.

(e) *Freeman v. Cooke*, 2 Ex. 654, 18 L. J. Ex. 114. (1848); and see *Evans v. Bicknell*, 6 Ves. 191; *Lee v. Taylor*, 11 N. Y. 131 (1893.)

(f) *Burrows v. Lock*, 10 Ves. 470 (1805).



1. *Deceit*.—According to the leading case of *Derry v. Peek* (*g*), “In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice.”

It has been said that deceit will lie in cases in which fraud may be imputed, although it does not actually exist: namely, in cases where the party making the representation was “a person within whose special province it lay to know a particular fact” (*h*). But *Derry v. Peek* lends no countenance to that view (*i*). It does, indeed, deal with such cases, but only to put them aside, as being “in an altogether different category from actions to recover damages for false representations, such as we are dealing with.” The general statement that for deceit “there must be proof of fraud, and nothing short of that will suffice,” is left unqualified.

2. *Negligence*.—For an action of deceit, then, there must be fraud. Now deceit, as we have seen, is an action of negligence, in which the duty to tell the truth is implied. The cause of action is based upon breach of duty; and negligence is breach (neglect) of duty. Now the duty must be the same in each case—the form of the action does not, and cannot, determine the character of the duty. The duty is that one shall not, fraudulently, misrepresent. Action in either form must, therefore, allege, expressly, or by implication, a breach of this duty; and it follows that, in both forms of action, there must be fraud.

3. *Restitution*.—One of the leading cases as to restitution is *Burrows v. Lock* (*j*), in which the trustee of a fund, upon being applied to by an intending chargee, falsely answered that there were no encumbrances upon it. The answer, although false, was given in good faith,

(*g*) 37 Ch. D. 541; 14 App. Ca. 337; 58 L. J. Ch. 864 (1887.)

(*h*) See Bigelow on Estoppel, 5th ed., p. 610.

(*i*) Nor do any of the *Derry v. Peek* “scholia”; *Glasier v. Rolls*, 42 Ch. D. 436; 58 L. J. Ch. 325, 820 (1889); *Tomkinson v. Balkis*, etc., L. R. (1891) 2 Q. B. 614; L. R. (1893) A. C. 405; 60 L. J. Q. B. 558; *Angus v. Clifford*, L. R. (1891) 2 Ch. 475; 60 L. J. Ch. 443; *Low v. Bouverie* L. R. (1891) 3 Ch. 82; 60 L. J. Ch. 594; *Le Lievre v. Gould*, L. R. (1893) 1 Q. B. 491; 62 L. J. Q. B. 353; *White v. Sage*, 19 App. R. 135 (1892).

(*j*) 10 Ves. 470 (1805).

for the trustee had forgotten the fact of a previous charge. Restitution was decreed, but whether upon the ground that there was "gross negligence" in the representation, or not, is far from clear (*k*). An action of deceit would not lie under such circumstances (*l*).

Sir Frederick Pollock limits the cases in which the Court of Equity, prior to the Judicature Acts, decreed restitution to "certain cases of fraud (that is wilfully, or recklessly false, representation of fact)" (*m*). But the equity doctrine of constructive fraud enabled the Court to find guilty a man, as against whose moral purity of action not a word could be said. And "conduct fraudulent in the eyes of this Court," varied so frequently with the eyes which the Court happened, for the moment, to be employing, that it is impossible to say (*n*), that for restitution there must be *mala fides*, as in deceit, or, as in estoppel, that "no fraud need have been intended" (*o*).

4. *Estoppel*.—For estoppel, "It is not necessary that the party making the representation should know that it was false; no fraud need have been intended" (*p*).

We thus see that for deceit, and negligence (upon a misrepresentation) there must be fraud; that for estoppel, there is no necessity for fraud; and that for restitution there must be fraud, but that it may be fraud of constructive character.

*Peculiarity in Application of Remedies*.—These anomalies, in the requisites for relief, find some parallel in those discovered in the application of the various remedies. For, observe that, very frequently, the remedy by estoppel may not be applicable to the particular case; although estoppel may actually exist. That is to say,

(*k*) The earlier case of *Evans v. Bicknell*, above quoted from, seems to show that the ground of relief would be that "he knows it to be false."

(*l*) *Low v. Bouverie*, L. R. (1891) 3 Ch. 82; 60 L. J. Ch. 594. But see Pollock on Torts, 244-8.

(*m*) On Torts, 167.

(*n*) And see Pollock on Torts, pp. 238-9.

(*o*) Since the Judicature Acts, *Derry v. Peek* (37 Ch. D. 541; 14 App. Ca. 337; 58 L. J. Ch. 864) is, no doubt, the governing authority. Restitution can no longer be looked upon as a distinct remedy.

(*p*) Per Lord Cranworth, in *Jorden v. Money*, 5 H. L. C. 212; 23 L. J. Ch. 865 (1854).

although the misrepresenter may be estopped from denying the truth of the misrepresentation, yet that such inhibition will not hurt him, nor help the other party.

For example, suppose that a man agrees to lend money upon mortgage of a house in course of erection, and to advance the money as the building progresses, upon the architect's certificates of the amount expended; that the architect is aware of the arrangement; and that he, inadvertently, issues false certificates, upon which the mortgagee advances so much money that he loses some of it. Under these circumstances the architect will not be liable in deceit (*q*), for there was no fraud (*r*); and although he will be estopped from denying the truth of his certificates, the estoppel will not hurt him, nor benefit the mortgagee.

Again, suppose that a warehouseman, through inadvertence, represents to you that he is holding certain goods for A., whereas he is really holding them for B.; and that upon the faith of this representation you buy the goods from A. Under these circumstances you cannot sue the warehouseman for damages in deceit, for there was no fraud. But in this case estoppel will help you to relief. Your course is to bring trover against him for the goods; to allege (quite contrary to the fact) that the goods are yours; and, when the trial comes on, estop him from denying your ownership, by showing that you acted upon his misrepresentation (*s*).

Observe that in the case of the architect you were unable to turn to practical account the estoppel which you could undoubtedly fix upon him. He was estopped, but you could make no use of the estoppel. You could not sue him for anything, and succeed by preventing as-

(*q*) *Le Lievre v. Gould*, L. R. (1893); Q. B. 491, C. A.; 62 L. J. Q. B. 853.

(*r*) The reason stated in the judgment is that there was no duty as between the architect and the mortgagee. That remark is appropriate to the suggestion of the existence of contract, but not altogether as a reply to a demand in deceit. If the architect knew that his certificates were to be relied upon, and he fraudulently falsified them, he would have been liable. There is always a duty not fraudulently to misrepresent.

(*s*) *Simm v. Anglo-American*, 5 Q. B. D. 188; 49 L. J. Q. B. 392 (1879).

sertion of some fact. You had to sue him in deceit, or not at all. The wrongs in the two cases are identical; yet, in the one case, there is a remedy, and, in the other, there is none.

*The Anomalous Result.*—The anomalous result then ensues, that an innocent misrepresentation will, or will not, be attended by punitive consequences, according as the chance circumstances will, or will not, permit use to be made of the peculiar principles of estoppel. If fraud be absent you cannot sue in deceit; you cannot, therefore, base your action upon the allegation that a representation was made to you, and that it was false. But if, by alleging certain truths, and adding to them, as a further truth, the representation made to you (which is, in reality, false), you can frame a cause of action, you will succeed; because the defendant will be estopped from denying the truth of the only false statement in your claim. In other words, you cannot succeed by alleging that the defendant made a representation which was false; but may (sometimes) succeed by alleging the false to be true. In the former case, could you succeed, you would have to prove that the representation was false; while, in the latter, you win by preventing the defendant from showing the same thing!

The present tangle may well be illustrated by two cases :—

*Burrows v. Lock* (already cited). The beneficiary of a fund wanted to borrow on it. The intending lender applied to the trustee of the fund for information as to charges; and the trustee, through forgetfulness, wrongly stated that there were none. The trustee had to make good the loss. Observe that, under *Derry v. Peek*, the trustee could not be sued in deceit, for there was no fraud. In estoppel, however, the lender could say to him: "Pay me over the fund"; and the trustee could not defend himself (by setting up the prior charge), because of his misrepresentation (that there was none), which would estop him.

*Slim v. Croucher* (t). An intending borrower offered, as security, a lease, which he said he was about to get.

(t) 1 DeG. F. & J. 517 (1863).

The lender required a written intimation from the landlord that he would grant the lease; and this the landlord signed. Afterwards it turned out that the landlord had previously leased the land to the borrower, and that the borrower had already assigned the lease to another person. The landlord had forgotten about the previous lease, when signing the intimation that he would grant one. The landlord was held to be liable.

These two cases seem to be very much alike. In both a man within "whose province it lay to know the particular fact" (if that has anything to do with it), had forgotten it, and by misrepresentation had induced an innocent person to change his position for the worse. But it seems now to be clear that while the decision in the former case was right, that in the latter was wrong (*u*).

The explanation is this: In the case of the trustee of the fund, the misled mortgagee could sue for the money; and the trustee, being estopped from setting up the earlier charge, would have no defence; while, in the case of the landlord, the action was (necessarily) purely for damages for the deceit, and it ought to fail for want of fraud. If Slim (the mortgagee of the lease) could have framed his action, against the landlord, so as to get the benefit of the estoppel, he would have been all right. But he could not.

Another illustration will assist in the full apprehension of the points. Suppose that I have a mortgage, and that upon being applied to, by a proposed subsequent incumbrancer, I, erroneously, tell him (believing such to be the fact) that my debt has been paid. In such case I would not be liable in deceit (for there was no fraud); but I would be estopped from setting up my mortgage as against the subsequent incumbrancer; and this would be the exact equivalent of damages, in deceit, for the misrepresentation. Suppose, however, in the same case, that my mistake arose from the fact that I had assigned my mortgage to a purchaser of it—the debt had not (as I represented) been paid, but had been

(*u*) See *Low v. Bouverie*, L. R. (1891) 3 Ch. 82; 60 L. J. Ch. 594.

transferred to a third person, to whom it was still due. In such case I would not be liable in deceit (because of no fraud); and there is no way to get at me through estoppel. I am estopped, no doubt, from ever saying that the debt is not paid, but that (under the circumstances) cannot injure me, nor benefit the person to whom I made the misrepresentation.

*Anomaly Induces Harmony.*—Law of this sort, which declares for relief, not upon the basis of the wrong, but upon the chance of the situation, is unsatisfactory, in all but this, that ingenuity, and judicial inclination, are thereby directed to the expansion of the law, in one direction or another, and, thus, to the establishment of harmony.

For example, what is to be done with this case? A corporation (by mistake) gives to A. a certificate that he is the owner of certain shares; so armed, A. sells the shares to X.; and the corporation, having discovered its mistake, refuses to recognize X. as a shareholder. Now, what can X. do? He cannot sue the corporation for deceit (for there was no fraud). Can he force the corporation to put him on the register? The only defence the corporation could make, to such an application, would be that the applicant is not entitled to be a shareholder; and, from this, the corporation is (in the supposed case) estopped by its representation. This seems, then, to be a likely remedy. But if, as may be the case, the company's register is already full—all its authorized shares have been issued—such remedy is impossible (*v*). What then? Why this, that ingenuity, and inclination, will discover that X. can sue the company for damages, for refusing to put him on the register; and (the company being estopped from saying that he ought not to be there), that X. will recover exactly the same damages as if he had sued in deceit. The company is not liable, for damages, in deceit, for the innocent misrepresentation; but it is liable, for damages, because of the deceit—although in round-about fashion.

Observe closely the *modus operandi* in this last case. The purchaser of the shares cannot say: "The company

(*v*) See *Reg. v. Charnwood, etc.*, 1 Cab. & E. 419 (1884).

represented to me that A. was the owner of the shares; I acted upon that representation; that representation was false; I am entitled, therefore, to damages." But he can say: "The company represented to me that A. was the owner of the shares; I acted upon that representation; that representation was true (at least the company cannot say that it is not); I am entitled, therefore, to damages." The former would be an action of deceit, and will not lie; because, although the plaintiff asserts misrepresentation, he cannot prove fraud. The latter is an action for refusing to register the plaintiff as owner of the shares; and will lie, because the plaintiff refrains from asserting misrepresentation (which is his real ground of complaint), and the company is estopped from avowing it. Although the damages in both cases are the same, they can be recovered, not by alleging the real grievance, but only by a careful and enforced suppression of it. An innocent misrepresentation, in this way, results in damages, in spite of *Derry v. Peek*; and circuitry is, once more, the road to harmony.

*The Present Situation.*—The result, then, seems to be, that a misrepresentation,

- (1) May be sufficient for both deceit and estoppel; or,
- (2) May be sufficient for deceit, and unavailable in estoppel; or,
- (3) May be insufficient for deceit, and also sufficient for, and available in, estoppel.

It seems that one factor in such case is the presence, or absence, of fraud; that the other factor is chance; that where there is fraud, there is always an action of deceit, but only sometimes effective estoppel; and that where there is no fraud, there is no action of deceit, but, according to merest chance, there may, or may not be estoppel, accompanied by damages, identical with those which would be recovered could an action of deceit be brought.

These are considerations which may lead to a revision of *Derry v. Peek*, and to the establishment of the action of deceit upon the same ground as estoppel, viz.: "Even where a representation is made in the

most entire good faith, if it be made in order to induce another to act upon it, or under circumstances in which the party making it, may reasonably suppose it will be acted on, then prima facie the party making the representation is bound by it, as between himself and those whom he has misled " (*w*).

Otherwise the anomalies above presented must remain. At present fraud is necessary to an action of deceit; but is unnecessary in estoppel. It is, as the writer thinks, impossible to introduce the element of fraud into estoppel as a pre-requisite. And if deceit will not lie without fraud, then we must be content to say that "an innocent misrepresentation will, or will not, be attended by punitive consequences, according as the chance circumstances will, or will not, permit use to be made of the peculiar principles of estoppel." This is not the best conceivable example of stable equilibrium. Some Judge, some day, will breathe upon it.

So also with the equitable doctrine of restitution. If the word "fraud," tempered, and qualified, by construction, may be applied to cases in which there is no element of fraud (in the sense of bad faith), the breach between the requisites of restitution and estoppel may be bridged. Not the lawyer, in this case, but the etymologist only, will be required, to make the situation comprehensible.

*A Suggestion.*—The following line of thought has much engaged the writer's mind, in pondering the anomalies above referred to:—

Can it be said that the idea of duty has nothing to do with estoppel? Follow this: For breach of duty the law provides punishment (awards damages); but in estoppel there is no breach of duty, and there is no punishment, but merely sequence, or consequence. For example: When I stand by, while another sells my property to an innocent purchaser, I am guilty of no breach of duty. I have a right to stand by if I like. I may, if I

(*w*) Per Lord Cranworth in *West v. Jones*, 1 Sim. N. S. 207; 20 L. J. Ch. N. S. 362 (1851).



choose, allow another to sell my property. I can do as I please with my own; and permit another, if I wish, to do as he likes with it. I am guilty of no breach of duty, in allowing him to sell my property; and, therefore, cannot be punished as for a breach of duty. But, if I allow another person to sell my property, a consequence ensues, namely, that I cannot afterwards assert my title: that is, that I am estopped.

Further observe that this view seems to obviate inquiry into the question of punishment in damages: I have permitted another to sell my property; I cannot afterwards set up my title; no injury then has been done to the purchaser; he thought that his vendor had the title; I am precluded from asserting otherwise; the title, then, is, as the purchaser understood; and he has not been injured; there is no question of damages.

Consideration of estoppel by contract, too, furnishes analogy. For example, a bailee is estopped from denying the title of his bailor. That is because, in the contract of bailment, the title of the bailor is taken, as between the parties, to be a fact. The bailor may have misrepresented his title; but that is immaterial; no question of duty not to misrepresent is involved; the point is, that that which between the parties was taken to be a fact, is, and remains, a fact.

And so in estoppel, not by contract, but by misrepresentation, may it not be said that, in this also, the question of duty is not involved. I misrepresent if I choose, and the consequence is merely this: that that which I have represented to be a fact is, and remains, a fact, so far as I am concerned.

Take an example (*x*): A mortgage purports to secure \$250, and the receipt of the amount is acknowledged, upon the document, by the mortgagor; but \$100 only was advanced; the mortgagee assigns the mortgage, representing that \$250 is due upon it; and the mortgagor is estopped from asserting otherwise. What is the rationale of the decision? Is it that the mortgagor, in executing the mortgage, and the receipt, owed a duty of care-

(*x*) *Bickerton v. Walker*, 31 Ch. D. 151; 55 L. J. Ch. 227 (1885); but see *Manley and London Loan Co.*, 23 App. R. 139; 26 S. C. R. 443.

fulness to those into whose hands the mortgage might come? Or is it that the mortgagor, having assisted in the misrepresentation (having made it credible), is really a party to it, and is visited with the usual consequence, namely, that that which he has represented to be a fact, is, and remains, as to him, a fact.

Test the case in this way: If there was a duty of carefulness, and a breach of that duty, then an action of negligence will lie; for such an action is based upon breach of duty. But (assuming that there was no fraudulent intent in the mortgagor) no such action could be maintained (while *Derry v. Peek* stands). And, if not, it would seem that there can have been no duty of carefulness, such as suggested. The estoppel, then, must have arisen as a consequence, and not as a punishment for breach of duty.

Again, recurring to the architect's case (*y*), in which a mortgagee advanced money to the owner of buildings upon the faith of the architect's certificates of amounts expended upon them. The reason given for the absence of liability on the part of the architect was that he owed no duty to the mortgagee. Yet there can be little doubt that the architect would have been estopped by his certificate, had the case been one in which his estoppel would have been of any benefit to the mortgagee. There was no breach of duty; but there was the usual consequence attending the misrepresentation.

Finally, returning to the mortgage case (*z*): Suppose the mortgagor had executed the mortgage, and given the receipt, for the purpose of enabling the mortgagee to represent that \$250 was advanced upon it, he would be liable in an action of deceit (*a*), because he was a party to the misrepresentation. This involves, as we have seen, the idea of a breach of duty towards the assignee. If the mortgage and receipt had been given without intention to defraud, the mortgagor would clearly not be liable in deceit. Those propositions in-

(*y*) Ante p.

(*z*) Ante p.

(*a*) *Evans v. Bicknell*, 6 Ves. p. 191 (1801).

volve these: that if the mortgagor was, knowingly, a party to the misrepresentation he was guilty of some breach of duty; and if he was innocent, then he was not so guilty. But this is equivalent to saying that (for the purposes of an action of deceit), although there is no duty not to misrepresent, there is a duty not, wittingly, to do so.

The idea of duty, then, is linked, to some extent, with misrepresentation. And is the solution of our difficulties this: that there is a duty not fraudulently to misrepresent; for a breach of this duty action will lie; that apart from fraud, there is no duty of carefulness not to represent; but that all representation as to fact carries with it the obligation of consistency, and the consequence of estoppel.

*Suggested Solution Unsatisfactory.*—Such solution is unsatisfactory, for, while it may, apparently, have the merit of symmetry, yet it, in reality, leaves all the anomalies above referred to in full operation. In fact it takes no cognizance of the most striking of them.

In the Bahia case the company was estopped by its certificate; and the result was, not the mere "consequence" that it had to register the purchaser of the shares (for it could not do so, the register being full); but the result was damages—damages for the loss occasioned by the misrepresentation.

An innocent misrepresentation thus resulted in damages; while *Derry v. Peek* has, authoritatively, determined that, only in cases of fraud, can there be damages for misrepresentation.

If, in the Bahia case, the frame of the action had been, "The company represented to me that A. was the owner of the shares; I acted upon that representation; that representation was false; I am entitled, therefore, to damages," the company would have won, because there was no fraud. Put, however, in another form, and the company loses: "The company represented to me that A. was the owner of the shares; I acted upon that representation; the representation was true; the company, nevertheless, refuses to register me; I am entitled,

therefore, to damages." State the case naturally, and you lose. State it artificially, and you win!

Were *Re Bahia* but a solitary case we might, for the time, shut our eyes to it, upon the ground that "questions destructive of all theology ought not to be raised." But *Simm v. Anglo-American* (b), (typical of many cases), must, also, be reckoned with. Not a company this time, but a warehouseman, innocently issued an erroneous certificate of ownership, upon the faith of which a purchaser, of the goods referred to in it, changed his position. The purchaser demanded the goods, and the warehouseman replied that, since issuing the certificate, he had ascertained that the goods really belonged to some one else. The warehouseman, now, is not liable in deceit, there having been no fraud. And it is impossible that he can be ordered to deliver up the goods, for they belong to a person who is in no way implicated in the misrepresentation. The purchaser seems to be remediless. He cannot complain of the deceit, for it was innocent; and he cannot have the goods, for they belong to a stranger. Nevertheless his course (although tortuous) is clear; and his goal (although not the one he may strive for) is well assured. He cannot have the goods, and will not get them, but he must sue for them as though he could. On the other hand, the damages which will finally be awarded to him, because of the misrepresentation, must, meanwhile, remain unclaimed. With artful indirection, he sues for delivery of the goods; the warehouseman answers that the goods are not the plaintiff's, which is the fact; the plaintiff replies estoppel. Logically, now, the plaintiff ought to be awarded the goods. But Lord Justice Brett gives judgment as follows (c): "In a similar manner, a person may be estopped from denying that certain goods belong to another; he may be compelled by a suit, in the nature of an action of trover, to deliver them up, if he has them in his possession, and under his control; but if the goods,

(b) 5 Q. B. D. 188 (1879); and see *Reg. v. Charnwood, Cab. & E.* 419 (1884).

(c) *Simm v. Anglo-American*, 5 Q. B. D. 207; 48 L. J. Q. B. 392 (1879).

in respect of which he has estopped himself, really belong to somebody else, it seems impossible to suppose that, by any process of law, he can be compelled to deliver over another's goods, to the person in whose favour the estoppel exists against him; that person is entitled to maintain a suit in the nature of an action of trover against him; but that person cannot recover the goods, because no property has really passed to him, he can recover only damages. In my view estoppel has no effect upon the real nature of the transaction; it only creates a cause of action between the person in whose favour the estoppel exists, and the person who is estopped."

The warehouseman is not liable for damages, in deceit, for the innocent misrepresentation; but he is liable for damages, because of the deceit—in round-about fashion.

In such cases as the two just dealt with, there seems to be no escape from the conclusion (while *Derry v. Peek* stands), that if the facts are stated naturally, and in support of the real ground of complaint, the plaintiff will be beaten; whereas he will succeed, if he states the case artificially, asserting, as his grievance, that of which he cannot complain. His grievance is the misrepresentation. Of misrepresentation he must say nothing. To the shares, or to the goods, he has no claim. These, he must assert to be his. Damages for the deceit (if anything) are what he is entitled to. Of this he must not say a word. Damages for not giving him the shares, or goods, he ought not to get (because such damages are given in lieu of specific delivery, and to delivery he is not entitled). Such damages are awarded him.

JOHN S. EWART.

(N.B.—The above article is an adaptation from Mr. Ewart's forthcoming work on Estoppel. He will be glad to receive criticisms of it addressed to Winnipeg.)

## EDITORIAL REVIEW.

### **Devolution of Land—Conflict of Laws.**

The alteration of the law of inheritance, or rather its complete abolition and the substitution of personal succession, is at first sight a comparatively simple measure, requiring only the use of apt language to carry it out, and bringing with it no more serious consequences than the inclusion of land in the administration of the estate. But on further consideration it will be found to involve some awkward questions of law. In its inception the Ontario legislation on this subject seemed to work the complete change of substitution of the personal representative for the heir, with the obligation to distribute the land, not amongst the heirs, but amongst the next of kin under the Statutes of Distribution. Like all such radical changes, it left all other cognate legislation, based as it was upon the hypothesis of descent upon the heirs, untouched and uncertain in its effect—either it was impliedly repealed, or the change effected could not have been so great as the legislation appeared to indicate. The enactment in the Devolution of Estates Act, that land should devolve upon the personal representative to be distributed “as personal property is hereafter to be distributed,” was as plain an indication as possible that there should be no distinction between realty and personalty in the distribution. But the maintenance of Locke King’s Act, and the various allusions to the rights and liabilities of heirs in other Acts, not repealed, and the retention of the whole statute of descent, also unrepealed, cast doubt upon this interpretation.

Then followed the Acts which provided that the land should shift from the personal representative into the “heirs” at the expiration of a year from the death of the intestate, but might be recalled by the administrator if required by him for the use of the estate. This again, was a plain intimation that the personal representative should hold the land temporarily for the payment of debts, but should not distribute it as personalty was

to be distributed. In spite of that direction in the principal Act, the land would go to the heirs, and these statutes must, therefore, have impliedly repealed that part of the prior legislation which tended to assimilate realty and personalty in the administration of the estate. All those other statutes, then, which prescribed the rights and liabilities of heirs, as such, regained their significance. And it might be alleged, as the result of the legislation, that the personal representative acquired a temporary property in the land for the purpose of administration, but was powerless over it at the end of a year, until he acquired by the last Act the right to recall it. Even then, his duties being performed, the property would again shift into the heirs. It being the natural course for the land so to go, it became the duty of the personal representative, if his administration was complete before the time arrived for shifting, to convey to the heirs, not to distribute the land as personal property was to be distributed. However unsatisfactory, with respect to some details, the legislation might be, this principle seemed to be certain, that, subject to the temporary and qualified ownership of the personal representative, the heirs under the statute of Victoria ultimately inherited as heirs.

In the general cleaning up of this year, in preparation for the decennial consolidation and revision, an entirely new departure has been taken. By 60 Vict. cap. 15, s. 3, section 27 of the Devolution of Estates Act, being the clause preceding those of the inheritance Act which prescribed the devolution of the land, is repealed, and all those clauses which relate to descent are declared not to "apply to estates of persons dying on or after the 1st day of July, 1886," the day on which personal succession to land was introduced. That is now the law. The result is that there is no statute of inheritance now in force. The direction in the original statute, to distribute land as personalty is distributed, regains its significance and force. But if the statutes which declare that at the end of a year the land shall shift into the "heirs" are to remain in force, what is to become of the

direction as to distribution, on the one hand, and what is there to define the meaning of "heirs" on the other?

Again, if a testator should devise land to his heirs, or to the heirs of A., it is prescribed that the word "heirs" shall mean the person or persons to whom such real estate would descend under the law of Ontario in case of an intestacy. Will this now mean that land shall go to the next of kin under the statutes of distribution? Or, will it mean that land shall go to those whom the testator understood to be heirs under the statute of Victoria?

A more complicated question would arise in case of the heirs or next of kin being domiciled abroad. It is a principle of international law that the succession of real estate is governed by the *lex loci rei sitæ*. The law of the place governs the descent. Suppose a child to have been born out of wedlock to an owner domiciled abroad, but legitimised *per subsequens matrimonium* according to the law of the domicil. According to the law of Ontario he could not inherit land in Ontario. But if land is to be treated as personalty, and distributed as personal property is to be distributed, will it not follow the principle of international law, and be distributed according to the law of the domicil? If that is the natural result, and so it would appear, there is no *lex loci rei sitæ* left—there is no law of inheritance of land, but succession will hereafter depend on domicil. It is quite possible that the owner of land in Ontario might die intestate domiciled in China. Is the land to be distributed according to Chinese law? It is true that the administrator might be absolved from responsibility by allowing the land to shift into the proper persons automatically. But how is one to ascertain the right of the owner to again convey? Altogether, some pretty questions may arise, which it will not be easy to settle.



## CORRESPONDENCE.

**Mortgages and the Statute of Limitations.**

*To the Editor of THE CANADIAN LAW TIMES :*

Sir,—In the recent English case of *Thornton v. France*, reported in (1897) 2 Q. B. 143, there is an important decision upon two points arising under a section of the Statute of Limitations relating to mortgages and persons claiming under mortgagees.

In this case, the owner of one undivided moiety of premises, which had been during the previous eleven years in the sole possession of the owners of the other moiety, mortgaged his moiety in 1886, and, in 1890, the premises having in the meantime been, and still continuing to be, in the sole possession of the owners of the other moiety, he executed a conveyance of his moiety, subject to the mortgage, to the plaintiff, who subsequently paid off the mortgage.

It was held that the plaintiff did not, on paying off the mortgage, become a person claiming under the mortgage within the meaning of the Real Property Limitation Act. It was also held that the Real Property Limitation Act does not confer a new right of entry on the mortgagee where, at the date of the mortgage, a person is in possession adversely to the mortgagor, and the Statute of Limitations has already begun to run in his favour against the mortgagor.

Both these points have arisen for discussion under R. S. O. c. 111, s. 22, which is substantially the same (except the difference in the period) as the corresponding section in the English Real Property Limitation Act, and some of our Judges do not seem to have reached the same conclusion as the Lords Justices of Appeal.

In the recent case of *Henderson v. Henderson*, 27 O. R. 93; 23 A. R. 577, the facts were as follows: The plaintiff's testator purchased a farm in March, 1881,

which he caused to be conveyed to himself, giving a mortgage for part of the purchase money; one of his sons went into possession in April, 1881. The mortgage was paid off in 1886, and a statutory discharge acknowledging payment by the testator was registered. His son continued in possession until 1893, and the defendants, to whom he devised it, were in possession when action was brought to eject them, and they claimed title by possession. In the Court of Appeal, Mr. Justice MacLennan held that the execution and registration of the discharge gave, in any event, a new starting point for the title. At page 588 he says: "I think that when David Henderson (the testator) redeemed the mortgage and got back his title from the mortgagee, he acquired a new right of entry or action for the recovery of the land, as a person claiming under a mortgage within section 22 of the statute, and that the defence under the Statute of Limitations must be held to fail." And in this view of the case Mr. Justice Burton concurred. This would seem to be opposed to the judgment of the English Court of Appeal delivered by Chitty, L.J., who says, at page 149: "Upon the execution of a re-conveyance by the mortgagee the mortgage is at an end, and the mortgagor cannot be considered as deriving title from the mortgagee."

The second point arose in *Cameron v. Walker*, 19 O. R. 212. In this case the statute commenced in 1876 to run against the owner in favour of the defendant, who was then in possession of the lands in question. In 1881 the owner mortgaged the lands, and under power of sale in this mortgage the lands were conveyed to the plaintiff. The defendant continued in possession until 1888, when action was brought. The Judges of the Chancery Division held that, although the mortgagor's title was barred by the defendant's possession of the land, the plaintiff, who claimed under the mortgage, was entitled to succeed, as the statute did not commence to run against the mortgagee until (as the earliest possible period) the time of the execution of the mortgage. In direct opposition to this view of the statute is the language of Chitty, L.J., in *Thornton v. France*, at page

158: "We think that that Act does not confer a new right of entry on the mortgagee where, at the time of making the mortgage, a man is in possession holding adversely to the mortgagor, and the Statute 3 & 4 Wm. IV. has already begun to run in his favour against the mortgagor. We can see no reason for giving so extensive a construction to an Act which was passed to remove a doubt—a construction which would tend in a large measure to undo the principal Act. The decision in this case will not in any degree imperil the rights of mortgagees. No person of ordinary prudence would advance his money on mortgage of land where the mortgagor claims an estate in possession, without first ascertaining that the mortgagor is in possession or in receipt of the rents."

It is hardly likely that *Thornton v. France* will be taken to the House of Lords.

Yours, etc.,

T. MACBETH.

London, Ontario.

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## BOOK REVIEW.

*The Canadian Annual Digest* (1896) of the cases reported in 25 and 26 S. C. R. ; 5 Ex., Nos. 1-3 ; 23 App. R. Nos. 1-4 ; 27 Ont. R. ; 17 P. R., Nos. 1-5 ; 5 Que. Q. B. R. ; 9 Que. S. C. R. ; 28 N. S. Reps., Nos. 1-2 ; 33 N. S. Reps., No. 4 ; 1 N. B. Eq., Nos. 2, 3 ; 11 Man R., Nos. 1-4 ; 3 B. C. R., No. 2 ; 4 B. C. R., and Privy Council cases. By CHARLES H. MASTERS, Reporter of the Supreme Court of Canada, and CHARLES MORSE, LL.B., Reporter of the Exchequer Court of Canada. Toronto : Canada Law Journal Co. 1897.

For some years we have presented to our subscribers an Index-Digest of all cases reported and noted in Canada (Quebec excepted) for the year. This was, and still remains, the only publication which covers so much ground. The Digest now published by Messrs. Masters and Morse digests only the contents of what are sometimes called the official reports. The usefulness of the publication depends entirely upon its coming out promptly, and covering the period expressed to be covered with exactness. There were published in 1896, besides those numbers digested, Nos. 4 and 5 of Vol. 27 of the N. S. Reps., about half a volume ; Nos. 9 and 10 of Vol. 10 of Man. Reps., and part 3 of 32 N. B. R. Making all allowances for the difficulty of getting a starting point for an annual digest, there seems no reason why, if digesting is to begin in the middle of one volume, it ought not to begin in the middle of another, especially if the middle of the volume is the beginning of the year.

As we publish an average of sixty cases a year not elsewhere reported, we are in hopes that our Index-Digest will still be found of use.

# THE CANADIAN LAW TIMES.

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NOVEMBER, 1897.

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## THE NEW LANDLORD AND TENANT.

WHEN the Act, 58 Vict. c. 26, s. 4, was passed we took occasion to look into the origin of the Act and the causes of its adoption for Ireland. And we further pointed out the probable effect of its provisions upon existing and future tenancies. A case almost immediately arose, *Harpelle v. Carroll* (a), in which Sir William Meredith, C.J., expressed the opinion, following two Irish cases, that the Act was not retrospective, and giving expression to the opinion that instead of restricting the right of distress, it apparently enlarged it. The Irish cases, with some difference of opinion, decided that the enactment was not retrospective, but the reasoning of the Judges who thought it was is so powerful that one could not hazard an opinion of what the result might be if the House of Lords had passed upon the enactment. One of the Judges of the Irish Court of Appeal said that it depended entirely upon the method of approaching the Act. From the standpoint of those Judges who thought the enactment retrospective, their judgments were reasonable, logical and sound. The same might be said of those who thought it prospective only when looked at from their standpoint. On such a narrow ground as this it would be a bold venture to attempt to predict the result of an appeal to a higher tribunal. The chief difficulty in the way of holding the Act to be prospective merely, is that, in the case of renewable leases, the renewed term, if

(a) 27 Ont. R. 240.

considered as an extension of the original one, will perpetuate a private law, so to speak, for themselves as long as renewed; but if taken to be new leases the lease would have to be re-drawn so as to preclude the possibility of a reduction of the landlord's rights by the enactment, and yet could not, in many cases, be so re-drawn on account of the contract for renewal, which usually requires it to be in the words of the original lease.

Another serious matter is whether a grant at a fee farm rent is within the enactment. Upon this the Irish Judges again differed. Some thought that it came within the very wording of the Act, while others thought that the Act was not intended to include it on account of the reference to the reversion, which showed an intention to deal only with those interests which were formerly created by retaining a reversion.

The question of the retroaction of the Act, however, is not decisive of all the points involved; for it might well be that, while not retrospective, so as to affect existing leases, it might yet affect all future leases, and so in the future deprive landlords of their right of distress. It may then be convenient here to discuss the origin of distress for rent, as a comparison of this enactment, though now repealed, with its repealing enactment is inevitable in ascertaining the effect of the later legislation. In *Harpelle v. Carroll* it is distinctly pointed out that the right of distress is feudal, and is incident to the reversion; and where there is no reversion there is no right of distress. It seems to follow, logically, that the abolition of the feudal relationship, and the declaration that the relationship shall depend upon the agreement of the parties, necessarily imports that no rights shall exist save those that arise out of the contract. It is idle to say that in all creations of the relation of landlord and tenant at common law there must be a contract, or rather it is a truism. The relationship is necessarily contractual, but results in a status to which are incident certain rights attached by law. As long as feudal law prevails, as long as the tenant is tenant

and the landlord is landlord the right of distress exists. As soon as the quasi landlord has a contract merely, and is not really landlord, either for want of a reversion, or by reason of the abolition of the feudal relationship, the right of distress disappears and he is relegated to the contract. If then "service," as the Act calls it, rent-service, no longer exists, but the "rent" is payable only by virtue of the contract, it would seem to follow that the contract must contain all the ingredients of the relationship.

Now, that is what the enactment says in plain terms. To adopt Coke's plan of interpretation—note that the enactment is affirmative in part, and in part negative. It states affirmatively that "the relation . . . shall be deemed to be founded on the express or implied contract of the parties, and [it declares negatively], not upon tenure or service." Now, if we carry this to its legitimate conclusion, it means that tenure or service shall have no place in the relationship. If there is no tenure, there is no tenant, and no landlord to hold from or under. Substituted therefor is the contract. If there is no "service," there is nothing which can be distrained for. The rent (what was formerly service) is not due from a tenant to a landlord—it is money due on the contract. More accurate language could not be devised for completely abolishing that which can be distrained for, rent-service, and substituting that which can be called for on contractual grounds only.

Another, and an entirely different matter, is the declaration that "a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases where there shall be an agreement, etc." The abolition of the necessity of a reversion was perhaps unnecessary. There was to be no more service or homage from the holder to the person from whom he was to hold. Therefore it was going beyond necessity to say, after abolishing service, that there should not be one qualified to receive service. Service is abolished, and payment under the contract is substituted. What is received under the agreement is not

service—it is money payable under contract to a person who can no longer exact service, which has no further place or existence in law. So that, whether the quasi landlord hold a reversion or not would make no difference. He could not claim or exact service, for service is abolished. He could claim and exact payment for his land because he held a contract.

Again, the right of the tenant to “hold” the land did not and could not depend on tenure. He did not “hold” it at all. If he did not hold it of the landlord, he owed him no service—nothing but what his contract called for. If the relation is to depend on agreement or contract, it goes without saying that a reversion is unnecessary. It seems unnecessary to have added, therefore, that a reversion should not be necessary in order to create the relationship.

But this part of the enactment does not affect the prior part, either to enlarge or reduce its meaning. Rent-service being abolished, tenure being abolished, and contract being substituted, the result is that the incidents of tenure and service disappear, and the remedies for refusal of service also disappear. The incidents of contract arise, and the remedies for the breach of contract must be resorted to. To hold otherwise would be to hold that while service was abolished, the remedy to recover it was retained—a manifest absurdity.

The whole result seemed to be that feudal tenure was abolished—the contractual relationship was substituted. The status of landlord and tenant disappeared before the elements of a contract which should thereafter be the whole law to the contracting parties. Before the enactment the contract did not give the landlord the right of distress—the law gave it to him in consequence of the execution of the contract as a feudal incident. “Hence,” says Blackstone, “the usual incidents to reversions are said to be fealty and rent.” And if the contract did not give it to him before the Act, it certainly could not give it to him since the Act. If that which gave the right of distress is



abolished, how can it exist without revival in another form? The contract could not give it to him after the Act unless so expressed, because that which gave it to him before without expression was abolished. Indeed, if a contract after the Act had expressly given the right of distress, it would most likely have been limited to a mere license to take the goods of the tenant, and not have been enlarged into a common law right of distress.

With great respect for the learned chief Justice's reasoning then, we find it difficult to arrive at the conclusion that an incident of the feudal relationship could remain without statutory retention after the abolition of the relationship itself. The matter, however, did not rest there. The Legislature appears to have been dissatisfied with the enactment. And, following the judgment in *Harpelle v. Carroll*, it passed an Act, 59 Vict. c. 42, s. 3, which repealed the enactment in question, substituted another, and declared that the repealed section was "intended to express the same meaning as this section, and no other." We may derive some satisfaction from the thought that the first enactment was open to criticism, but absolutely none from the enactment which professes to throw light on the question, for the new enactment is as difficult to interpret as the old one. In spite of the Legislature the two enactments do not mean the same thing. The sum and substance of the new enactment is equivalent to stating the insoluble problem—let  $x=y$ ; find the value of each.

The substituted enactment is as follows:—"The relation of landlord and tenant is not hereafter to depend on tenure, and a reversion or remainder in the lessor shall not be necessary in order to create the relation of landlord and tenant; or to make applicable the incidents by law belonging to that relation nor shall any agreement between the parties be necessary to give to a landlord the right of distress." The punctuation has suffered in the proof reading, the semi-colon evidently having changed places with the comma.

An attempt has been made to render the enactment clearly prospective only by the introduction of the word "hereafter." But that does not necessarily prevent its operation upon existing leases. Grammatically as well as interpretatively, the word might well be designed to alter the character of existing tenancies. That is to say, the section might be paraphrased thus: "Whereas a number of tenancies now depend upon feudal law or tenure, hereafter they shall not depend thereon." While we do not pretend to say that the reasoning of the Judges in the Irish cases would not apply to this clause as well as to the repealed one, we do mean to say that we must travel outside the section for principles of law applicable to the interpretation of statutes generally in order to ascertain whether the enactment is retrospective, or prospective only. as was done in the Irish cases, and we cannot predict with certainty that the words of the enactment clearly render it prospective only.

The decision in *Harpelle v. Carroll*, however, may be taken to settle the law as to that, especially, the learned Chief Justice points out, as there are existing enactments especially affecting distress in the original enactment which indicate that the right of distress does still exist for some purposes, and it could only exist with respect to the then current leases. It remains an interesting question, if the Act makes a distinct change in the law, how a renewal of an existing lease is to be treated. Can the landlord claim in his new lease, to be made on the same terms as the old one, that he is to have the same rights, or is he to take a different lease from that which his contract calls for?

Before proceeding to a comparison of the two enactments, and an interpretation of the new one, there is one observation to be made as to the wording of the new enactment. In making it, we may reflect upon some person unknown, otherwise entitled to respect, but on account of the phraseology used certainly deserving of censure. When the draftsman wrote that "a reversion or re-

mainder in the lessor shall not be necessary in order to create the relation of landlord and tenant," he gives indisputable evidence that he never knew the difference between a remainder and a reversion, or if he ever did that he had entirely forgotten it. It is elementary learning that no tenure exists between a remainderman and the particular tenant, while it did exist between the reversioner, or landlord, and the tenant. The remainderman necessarily takes from the same grantor that the particular tenant takes from, and never, in the creation of his estate, comes into contact with the particular tenant. Thus, on a grant to A. for ten years, and thereafter to B. in fee, A. and B. both take from the grantor. A. is not, and cannot be, tenant to B. In other words, the particular tenant does not take anything from the remainderman, does not hold from or under him, and there never was and never could be any tenure between them. It may be presumptuous to differ from the Legislature on dry points like these, but the difference is essential. The confusion of thought plainly apparent in the drafting does not encourage one to suppose that any greater clearness would be exhibited in the remainder of the draft. There may have existed an unjustifiable fear that a case might arise in which a particular tenant might hold of a remainderman. But it appears from past experience to be entirely unfounded.

Want of clearness in expression is usually attributable to want of well-defined ideas. In dealing with the enactment, then, it must be treated as if the reference to a remainderman were entirely obliterated. The only effect of its appearance in the clause is to indicate a want of exactness, which, however, is apparent throughout the section.

Proceeding now to the interpretation of the clause, we may note that it is divided into four parts:—(i) The relation of landlord and tenant is not hereafter to depend on tenure; (ii) a reversion in the lessor shall not be necessary in order to create the relation of landlord and tenant;

(iii) a reversion shall not be necessary to make applicable the incidents of law belonging to the relationship; (iv) an agreement between the parties shall not be necessary to give to a landlord the right of distress. Now note, that the whole enactment is negative only.

The former enactment was divided into four parts:—  
(i) The relation shall be deemed to be founded on the agreement; (ii) it shall not be deemed to be founded on tenure or service; (iii) a reversion shall not be necessary to such relation; (iv) wherever there is an agreement to hold land in consideration of rent the relation shall exist. The last is but a repetition of the first.

The ingredients common to both enactments are (ii) in the first, (i) in the second, viz., the relation shall not be deemed to depend on tenure. The omission of "service" and the substitution of "depend" for "found" is immaterial. Elements (iii) in the first and (ii) in the second are common, viz., a reversion shall not be necessary to the relation. Elements (i) and (iv), the affirmative part of the first enactment disappear, and in the second enactment two negative elements are added, viz., that a reversion shall not be necessary to make the incidents of a tenancy applicable, nor shall an agreement be necessary to give a right of distress. Nothing but the supreme power of the Legislature could ever make an affirmative mean the same as a negative, nor make two totally different Acts mean the same thing.

The complete disappearance of any affirmative enactment in the second Act makes it extremely difficult to interpret. The second is interpretative of the first, but to interpret the affirmative words of the prior enactment by leaving them out of the second, does not lead us rapidly to a sense of their meaning. Theretofore the relation of landlord and tenant depended entirely upon the feudal system. The tenant held of the landlord upon services to be rendered. After the Act the tenant does not hold of the landlord, and no service is due. Now, upon what is the relationship to depend? The former enactment was in-

telligible in supplying something in place of what was abolished. The latter Act in express terms abolishes the feudal relationship altogether, and substitutes nothing for it.

Now that the relationship, or something like it, was intended to be preserved is manifest. What shall not be necessary for it is stated in the Act. What shall be necessary for it is left to conjecture. The only conjecture that can be made concerning it is that it must arise out of or by means of a contract. This conclusion would be irresistible were it not that the affirmative declaration, that it should depend on contract or agreement, is deliberately omitted. In other words, the first enactment containing that declaration is interpreted by the second as meaning the same thing as if it did not exist. There must have been a reason for omitting the affirmative enactment. What was it? The danger that the whole of the rights might be governed by the contract. That is evident from the criticisms in the Irish cases, and indeed from the enactment itself. It is apparent from the new enactment itself, for it states that an agreement shall not be necessary to entitle the landlord to distrain. Plainly, then, the fear that the rights of the parties might be limited by the contract was the cause of omitting the declaration that the relationship should depend on contract. In other words, both enactments mean that the relationship should not depend on contract, nor shall it depend on feudal law.

In spite of that, it must depend on something, and as contract is the only way of bringing two together, the relationship, if it is to exist at all, must depend on the agreement, or be created or called into existence by contract, but perhaps shall not be limited or controlled by the contract.

This is a curious result, and yet no other seems possible. Under the first enactment (not interpreted in the second) the relationship was founded on the contract, and, therefore, was necessarily limited by the contract. But under the first enactment (as interpreted by the second), or under

the second, as an interpretation of the first, the relationship is not to depend on the contract. The only solution of this is that a contract must be made, in spite of the Act, to create the relationship, but it is not to limit it.

This would have been intelligible enough if it were not for the negative enactment that it is not to depend upon tenure. It is quite conceivable, in fact it was the law, that a contract of letting having been made, all the incidents of a tenancy followed by feudal law. But now the feudal law, which supplied all the incidents of the relationship, is not to apply. So that, although there is only one way of creating a tenancy, by contract in spite of the Act, there is no law to indicate what the limitations, rights and incidents are unless the contract furnishes them. But we had already arrived at the conclusion that though a contract was necessary to call a tenancy into existence, it did not define the rights of the parties. Which is absurd, of course. But the only other conclusion is that while the relationship is to be created by contract, the incidents, rights and obligations are to be supplied by law, *i.e.*, the feudal law. But, with tenure, that is abolished. Which is also absurd.

There is still a possible solution, but it is one that defies the whole enactment. It is to adopt the reasoning in *Harpelle v. Carroll*, that the already known relation of landlord and tenant remains intact, but it is not to depend either on feudal law, or now on the contract. Now, if no change has been made in the law, what was the Act passed for? Is the whole law to remain entirely as before, with all the rights, obligations, incidents and remedies of the old relationship? And is the Act merely a dead letter? What difference does it make how all these matters originate, or on what they depend, if they are to remain? The main purpose of the prior enactment was to substitute contract for feudal status. The object of the latter enactment was to abolish the feudal relationship and to substitute nothing. To what end is the feudal relationship abolished if everything is to remain as before? This interpretation, as well

as that in *Harpelle v. Carroll*, defies the whole enactment, and renders it entirely inoperative, except as presently indicated.

The legitimate consequence of abolishing tenure is to abolish the incidents of tenure, unless they are expressly retained. If they are retained, what is the purpose of the Act? If they are abolished with tenure, then the Act has a purpose. But this very purpose, the abolition of the right of distress, amongst others, is denied. There is nothing but hopeless confusion, and we venture to say that no parallel exists—no Act completely abolishing any law was ever held to retain all that law.

Without having arrived at any satisfactory conclusion with regard to the principle of the Act other than that it is completely annihilative, we proceed to the declaration that a reversion shall not be necessary to the creation of the relationship. It is assumed that it may be created, but not by tenure. It is assumed that it may and will be created, but a reversion shall not be necessary. Now, if we can assume that in spite of the Act the ancient relationship can still be created, this particular enactment that a reversion shall not be necessary may have a very important effect. Hitherto, where a quasi relation was created, there being no reversion retained, the result was that there were none of the peculiar incidents of the relation annexed to it. This we shall show presently, but, in the meantime, pause to point out that such a state of facts can occur but in a limited class of cases.

Thus, if any freeholder demises the land for years, he must always retain a reversion, for a term of years, however long, is always less than a freehold, however short. It is only, then, when a man, being possessed of a term of years, sublets for the same term, that the quasi relationship can be created without retaining a reversion. Such instances have frequently occurred.

Thus, in *Selby v. Robinson* (b), a lessee of land for five years sublet the land for seven years. It was held, as

(b) 15 C. P. 390.



between the original lessor and the so-called sub-tenant, that the effect was an assignment of the term and not a sub-lease. But the cases cited in the judgment show that, as between the original tenant and his so-called sub-tenant, the relationship of landlord and tenant subsisted, but that as the tenant had retained no reversion he could not distrain for rent on the sub-tenant. The cases need not be more particularly referred to, as they all agree that the want of a reversion deprives the landlord of the right of distress.

Now to all such cases as that just mentioned, and possibly in the case of a grant at a fee farm rent, the enactment will apply. A reversion in the lessor shall not be necessary in order to create the relation of landlord and tenant. Assume the affirmative pregnant in the enactment, that the common relationship, with all its incidents, can be created; now if a reversion is not hereafter to be necessary to the genuine relationship, the result is that even in the absence of a reversion the right of distress will exist. This is a startling result. The result may then be that indicated by Sir William Meredith, C.J., that, the relationship still existing, though differently created, the right of distress is now enjoyed by a landlord who has no reversion. Perhaps no more radical affirmative result was ever before extracted from a bundle of negatives.

This result would seem to be confirmed by the next limb of the enactment, which declares, quite unnecessarily if the foregoing is correct, that a reversion shall not be necessary to make applicable the incidents of law belonging to the relationship. There is an affirmative pregnant here also. The clause assumes that the incidents all exist as heretofore; that the enactment is utterly ineffective to change the law, though it asserts that which should completely abolish it. Upon that assumption the change is very sweeping, and gives to a mere contract of letting, without a reversion existing, all those incidents of a feudal relationship which did not formerly attach to it, the relationship itself having been in the previous limb of the section itself declared not to exist.



Finally, an agreement shall not be necessary to give a landlord a right of distress. It never was necessary, and if it never was necessary before, the declaration that it shall not be necessary since, the Act works no change whatever in the law.

What strikes one most forcibly in the whole enactment is the studious avoidance of saying what shall be, and the anxious desire to say what shall not be. To declare even affirmatively that the relationship should not depend on tenure, but that all the law should remain the same as before, would have been intelligible, though academic only. And yet the Legislature avoids that explicit declaration, and leaves the whole matter open to conjecture.

To have declared affirmatively, without more, that a reversion should not be necessary to the relationship, and that the right of distress should be given to a landlord, though he had no reversion, would have been intelligible, and would have worked a radical change. But that explicit declaration has been avoided, and yet, if we do not plunge into hopeless absurdities, that is the only real change made in the whole law, with the exception of one important result about to be mentioned.

It may be taken for granted that the estate of the tenant at common law depended entirely upon tenure. Without tenure he could not hold the land. With tenure he does hold it, and thus gains an estate. Now, if tenure is abolished, has the tenant any estate? The Act does not deal with this. It is directed to other matters, but this most important one has not a shadow of a suggestion devoted to it in the whole section. We find affirmatives assumed in the negations of the enactment as to other matters, but nothing as to this. The old relationship, let us assume, is to exist, but it is statutory. That is, it may exist under circumstances that the common law did not permit, viz., without a reversion. But is it the same? If tenure is abolished, has the tenant an estate? Has he more than a contract of hiring, personal in that he may

not assign it? It may be observed that there is no indication in the Act that the nature of one tenant's interest is to be different from that of another. At common law that might, in a measure, have been so, but relatively only. Thus, upon the facts stated in *Selby v. Robinson* (*supra*), the so-called sub-tenant had, as regards the superior landlord, the whole term. As regards his immediate landlord he also had all the term, but owed rent on his contract. In other words, he was tenant without a landlord in the strict sense, the so-called landlord having no right to distrain. In all dealings with third persons he would probably have been deemed to possess the whole term. Now the enactment levels all tenants' interests to one standard. A reversion not being necessary, the relationship being statutory, all tenants must have the same interest, whether it be the whole of the landlord's interest or less. How can that interest be described? Whether the landlord retains a reversion or not the tenant has only his contractual right. Can it be called an estate? Or is it anything more than a right to use the land under a contract of hiring of the same nature as a contract of hiring of a chattel? This is a matter of vast importance, inasmuch as if he has no estate in the land he cannot mortgage it, or assign or sublet without special leave given him by the contract. If, on the other hand, he has an estate, then the crowning absurdity of the enactment is attained, and absolutely no change has been made in the law, except to extend the right of distress to landlords who have no reversions.

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## EDITORIAL REVIEW.

**Devolution of Land—Conflict of Laws.**

We call attention to Mr. Marsh's letter in the present number upon this subject, in which he takes exception to our remarks in regard to the effect of the Devolution of Estates Act, the Acts of 1891 and 1893 affecting the sale of lands by executors and administrators, and the repeal of the Statute of Victoria, as far as the estates of persons dying after the 1st July, 1886, are concerned. Mr. Marsh solves the difficulty of interpretation by submitting that the word "heirs" in the Acts of 1891 and 1893 must be interpreted in a popular sense, as persons beneficially entitled to the land upon the death intestate of the propositus. We think we fairly state his argument in so reducing it down to this one proposition. While it is undoubtedly a method of arriving at a solution, a matter which we shall presently discuss, we feel obliged to Mr. Marsh for pointing out, as he manifestly does in his letter, although perhaps unconsciously, that there is in fact a difficult question to determine, that the solution is hopeless unless we resort to a popular synonym for the word "heirs," while the expression "persons beneficially entitled" is not only somewhat vague, but can hardly be said to be a popular term.

The points which we took in our remarks were as follows:—First, the Devolution of Estates Act indicated that lands were to go to the next of kin; secondly, the Act of 1891 expressly stated that the land was to go to heirs. Now, between these two conflicting statements, it is absolutely necessary that one or the other should give way. No light can be derived from the use of the expression "heirs and assigns" in section 10 of the Devolution of Estates Act, for the evident intention of that clause was to make liable the personal representative, that is, the executor or administrator, who took the real assets under the Devolution of Estates Act, in cases where heirs were bound technically by a covenant in a deed. The section

does not extend further than that, or perhaps we should say was not intended to extend further than that, and throws no light upon the interpretation of the Act of 1891. It does throw some light upon the interpretation of the Devolution of Estates Act, if any were required, because it harmonizes covenants made with heirs and assigns with the purpose of the Devolution of Estates Act, by casting the liability as well as the land upon the personal representative. If any inference can be derived from it, then, it is rather in favour of showing that though you may use a technical expression "heirs and assigns," it shall mean the personal representative because the personal representative takes the land.

That still leaves open for discussion who are the persons "beneficially entitled." Now, if the Act of 1891 had used, instead of the expression "heirs," the phrase, the "persons beneficially entitled to land in case of intestacy," there is no doubt that the next of kin would have been comprehended in that expression. But when we have a special statute dealing with heirship, repealed only for the purpose of the Devolution of Estates Act, and have the persons indicated in that Act spoken of in a subsequent statute, the inference is very strong that there is intended to be a revival of the law as fixed by that statute. Mr. Marsh's suggestion is that as all statutes of descent are repealed, the probability would be that the common law was revived rather than the Statute of Victoria. We prefer the other inference, that the Statute of Victoria having been repealed only for the purpose of letting in the Devolution of Estates Act, the modification of the Devolution of Estates Act in favour of heirs would revive the Statute of Victoria to the extent necessary to make it applicable.

The Statute of Victoria having been again repealed, however, we are faced with the two contradictory enactments, one in the Devolution of Estates Act as to the next of kin, and the other in the Act of 1891 as to the inheritance by heirs. It is going very far to assign a meaning to

the word "heirs" other than that which it familiarly bears. It is a word of art in conveyancing, it is true, but it is also a highly technical word in law, and signifies persons who take land as contradistinguished from next of kin, who take personalty. Now to assume, or to infer, or to say that the implication of a statute, when it uses the word "heirs," is that it means the exact opposite, is going very far in the way of presumption. We should prefer to say that as the two terms are entirely contradictory, the last should govern, and that the Devolution of Estates Act should be impliedly repealed as to that part of it which directs the distribution of land amongst the next of kin.

Still, there exists, however, the Act repealing the Statute of Victoria. If, however, the word "heirs" has any popular signification when contrasted with next of kin, it should have the signification which it ordinarily bears. If, on the other hand, the word "heirs" is not to mean what it says, but is to mean next of kin, then we have, even on Mr. Marsh's reasoning, the next of kin taking land as personalty from the personal representative, and the law of the domicile must therefore govern the succession. There is a dictum in *Ripley v. Waterworth*, 7 Ves. at page 438, in which Lord Eldon said: "Yet I doubt whether an executor or administrator ever takes anything as such that he would not be bound to apply as personal estate of the testator." The question in that case was whether an executor could be a special occupant, and, if so, whether he would not hold for the next of kin. The affirmative was held.

If that dictum is sound, if "heirs" is popular phrasing for next of kin, they take land as personalty in course of distribution from the personal representative. And therefore land being distributed as personalty, the law of succession will be regulated by the domicile of the defunctus.

We think that this problem is one which should be solved by the Legislature, by making a declaration either in one way or the other that the next of kin or heirs under the Statute of Victoria should take.

## CORRESPONDENCE.

**Devolution of Land—Conflict of Laws.**

*To the Editor of THE CANADIAN LAW TIMES :*

Sir,—I have just read your Editorial Review, under the above caption, in the October number of The Canadian Law Times, and it has occurred to me that if the same ingenuity were exerted in harmonizing the various statutory provisions, which has been used in constructing a jeremiad, the doubts and difficulties which now loom up to the tearful eye might be so clarified and settled, by the application of ordinary legal and equitable principles, as to lead to a result consistent with the intent of the Legislature as interpreted by the traditions of Osgoode Hall.

I do not, myself, pretend to be able to exert the aforesaid ingenuity, but I shall offer a few suggestions which possibly may indicate a way of escape from dire disasters, and make it possible that sunshine and gladness may yet abound in the land.

Your first difficulty, sir, appears to arise from the provision of the Devolution of Estates Act, that real estate vested in any person shall, on his death, "Devolve upon and become vested in his legal personal representatives from time to time," and that it "Shall be distributed as personal property not so disposed of, is hereafter to be distributed," followed as it is by the provision of the Statute of 1891, that such estate as is not disposed of by the personal representatives within twelve months after the death of the testator or intestate shall be "Vested in the devisees or heirs beneficially entitled thereto as such devisees or heirs (or their assigns as the case may be), without any conveyance." This latter provision, you say, "Was a plain intimation that the personal representative should hold the land temporarily for the payment of debts, but should not distribute it as personalty was to be dis-

tributed. In spite of that direction in the principal Act, the land would go to the heirs, and these statutes must, therefore, have impliedly repealed that part of the prior legislation which tended to assimilate realty and personality in the administration of the estate. All those other statutes, then, which prescribed the rights and liabilities of heirs as such regained their significance. . . . This principle seemed to be certain, that, subject to the temporary and qualified ownership of the personal representative, the heirs under the Statute of Victoria ultimately inherited as heirs."

I cannot think, sir, that this result necessarily followed from the legislation of 1891, or that it followed at all.

The 27th section of the Devolution of Estates Act repealed the provisions of the Statute of Victoria in so far as that statute would otherwise affect the estates of persons dying on or after the first day of July, 1886, and it is submitted that the effect of the Devolution of Estates Act of 1886, being sections 1 to 9 as now contained in the Revised Statutes, was to bring about a similar repeal with reference to the Statute of William, if that latter statute had not already been repealed by the Statute of Victoria. It is probable that even an express repeal of that portion of the present Devolution of Estates Act which comprises the provisions formerly contained in the Devolution of Estates Act of 1886 would not revive the provisions of that portion of the present Devolution of Estates Act, which was formerly contained in the Statute of Victoria, so as to make them applicable to estates of persons dying after the first day of July, 1886 (see Sec. 43 of the Interpretation Act); but, however that may be, it is submitted that it is highly improbable that the provisions of section 4 (1) of the Devolution of Estates Act, designating who are the beneficiaries in case of an intestacy, were in any way repealed or altered by any implication from the phraseology employed in the Statute of 1891, enacting that after the lapse of a year the estate should, under certain circumstances, be vested in the heirs beneficially entitled thereto or their

assigns. If, however, any such alteration was thereby effected it would appear that the identity of the heir must be ascertained by reference to the common law, and not by reference to the Statute of Victoria.

It is submitted, sir, that the statute of the present year referred to by you (and which, though repealing a statute in form, is in effect an amendment of section 27 of the Devolution of Estates Act) does not in any way touch the question in controversy.

Section 10 of the Devolution of Estates Act provides that in the case of a person dying after the first of July, 1886, his heirs and assigns shall, in the interpretation of any statute of this Province, or in the construction of any instrument to which he was a party or in which he was interested, be deemed to be his personal representatives, unless a contrary intention appears.

We must, of course, ascertain what is the meaning of the words heirs and assigns, as used in the Statute of 1891. It is apparent that we cannot interpret these words by the aid of section 10 of the Devolution of Estates Act, for the persons mentioned are the "heirs beneficially entitled," are therefore the personal representatives, could not be the persons mentioned. There seems to be no reason whatever for interpreting the words "heirs and assigns," as used in the Statute of 1891, by reference to the provisions of the Statute of Victoria, which had previously been repealed in so far as concerns the estates of persons dying after the first day of July, 1886. If the words "heirs and assigns," as used in the Statute of 1891 are to be interpreted as technical words of art, there would appear to be more reason for applying to them their common law meaning and ascertaining the identity of the person by the rules of the common law, than for applying to them the provisions of any repealed statute. I submit, sir, however, that it is exceedingly improbable that the Legislature meant to throw us back to the Common Law heir as the person beneficially entitled, and that it is easier to believe that the words were used in a popular sense, which use, indeed, has been difficult to dis-



card since the passage of the Revolutionary Act of 1886, that is, they were used to mean those persons who at the time of the passing of the Act of 1891 were by law entitled beneficially to the real estate of an intestate; it makes no difference that the same persons were by the same law entitled also to his personalty. If this interpretation be adopted the whole matter becomes perfectly plain and free from difficulties; and the Statute of 1891 will in no way interfere with the provisions of the Devolution of Estates Act, touching the question, who are beneficially entitled to the real estate of an intestate? and the Statute of 1891 will be confined to its proper object of assisting us to determine where the legal estate is, and, under certain circumstances of vesting that legal estate in the persons beneficially entitled, without the necessity for any conveyance.

You say, sir, "a more complicated question would arise in case of the heirs or next of kin being domiciled abroad." If my previous conclusions are correctly drawn this question would appear to be reasonably free from complication.

Yours truly,

A. H. MARSH.

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**Foreign Judgments.**

*To the Editor of THE CANADIAN LAW TIMES.*

Sir,—An important and practical step in the direction of Imperial Federation could be accomplished by legislation giving validity to judgments of superior courts of law, whether British or colonial, throughout the Empire.

Assume a case in the Supreme Court of Judicature in England—an action for debt—in which service is effected on the defendant, a resident in Canada, under the Rules of Court providing for service out of the jurisdiction, which is, presumptively, only permitted in certain classes of cases where it seems proper and just that the defendant should be called upon to appear in the English Courts. The defendant does not appear, and judg-

ment is entered against him as on default of appearance. Now, this judgment is final and conclusive against the defendant in England (subject, of course, to his right to move to set it aside); but send an exemplification of this judgment to Canada, and attempt to sue on it, and you are at once met with the defence that the judgment is not a judgment "on the merits," and the plaintiff is obliged to sue on his original cause of action. That is to say, that, unless the defendant happens to have assets available to execution in England, he can treat the Queen's process with contempt, and the plaintiff has to go to the expense and trouble of proving his case in the colonial Courts (being required also to give security for costs), which *ex hypothesi*, from the rules as to service out of the jurisdiction, it is unjust to require him to do.

In case of attempting to enforce a colonial judgment (by default) in England, exactly the same difficulty is experienced. To illustrate the hardship. A client of mine—a small shopkeeper in a western village—began an action here against a wealthy gentleman resident in England. The cause of action having arisen here, and the case coming clearly within our rules (copied from the English) for service *ex juris*, the defendant was, by order, served in England, and allowed (I think) sixty days for appearance. Failing to appear, judgment was entered by default. We sent the judgment to a firm of solicitors in London, who wrote us they could not sue on the judgment, for the reasons above indicated; but they thought that a "summary judgment" might be obtained under O. XIV. on the original cause of action. We accordingly forwarded affidavits and £10 for security for costs. We are then informed that the case is not one for summary judgment, and that we shall have to proceed in the regular way, and we are requested to forward £100 to deposit as security for costs, and £26 10s. 6d. to brief counsel, being assured that this, with the £10 already forwarded, will be sufficient funds in hand to enable the solicitors to conduct the case to trial and judgment.

My client accordingly sends £126 10s. 6d. to the London solicitors. The case proceeds, and it becomes necessary to send a commission to Canada to take evidence. This is executed at an additional expense to the plaintiff of about £50. When it is returned to England the solicitors write us that it will be necessary to retain a Q.C., as well as a junior, and that they cannot think of carrying the case any further without an additional sum of £100. Incidentally we are informed that the English Judges are too impatient to listen to a junior, and are inclined to think the plaintiff's case necessarily a poor one if Queen's counsel is not retained.

My client, having already invested £186 6s. 6d., cannot see his way to further impairing his slender capital by raising the additional £100 required, and he is finally obliged to consent to a dismissal of his action, without costs, receiving back of the £186 6s. 6d. sent to England, the sum of £90 18s. 9d.—net loss to my client, £50 + £46 6s. 0d. = £90 6s. 0d., though English counsel had advised that we had a good cause of action, and a fairly clear case against the defendant.

It would really seem as though there were room for practical and feasible legislation—British and colonial—to remedy the general state of affairs indicated by the above particular instance.

Yours, etc.,

ADVOCATE.

Calgary, N.W.T., Canada, 1st September, 1897.

P.S.—The statement that a "default judgment" is not a judgment on the merits and cannot be sued upon is perhaps somewhat dogmatic; but the cases seem at least to tend to this view, and it may be assumed, at any rate, for the purposes of this letter.

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## BOOK REVIEW.

*The Transfer of Land Act, 1890*, with notes thereon and a comparative table of the whole of the Australasian Land Transfer Acts. By F. G. DUFFY, M.A., LL.B, Barrister-at-Law, Editor of "A'Beckett's Transfer of Land Statute" (second edition), and J. G. EAGLESON, B.A., LL.B., Barrister-at-Law, joint author of "Eagleson and Wasby's Digest." Melbourne: Charles F. Maxwell. London: Sweet & Maxwell, Limited. Toronto: The Carswell Co. Limited. 1895.

This is the most comprehensive work on the Land Titles System which we have ever seen. It covers all the various Acts, exhibiting the principles of all, with special details of each, it cites numerous Australian cases, and those in the Judicial Committee upon the effect of the Acts, and contains advice or instructions from the Land Titles Office to persons who are concerned with registration or transfer. A good deal of purely local matter is necessarily introduced, but, taken altogether, the work is the most useful we have seen.

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# THE CANADIAN LAW TIMES.

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DECEMBER, 1897.

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## INTERPLEADER: LANDLORD CLAIMING RENT.

**W**HEN a sheriff has seized goods and the landlord makes a claim for rent, it is the sheriff's duty on ascertaining that the rent is really due, to ask the execution creditor for it, and upon receiving the amount to satisfy the claim. If the creditor will not furnish the money, the sheriff may withdraw from possession (a).

If, instead of satisfying the claim, the sheriff interpleads, his application will be refused (b), because it has been said that the landlord's claim is not a claim to the chattels or their proceeds as the property of the claimant (c). But if the execution creditor disputes that the rent is owing, an interpleader order will then be made (d).

When an execution creditor pays the landlord rent in arrear, so that the sheriff may sell, the execution creditor is entitled to be repaid out of the proceeds of the goods such advance as a salvager (e).

After a writ of fieri facias had been executed and a return made thereon, but before the money was paid over to the execution creditor, the sheriff was allowed to

(a) *Cocker v. Musgrove*, 9 Ad. & E. 223; *Locke v. McConkey*, 26 C. P. 475; *Maclean v. Anthony*, 6 Ont. R. 330.

(b) *Clarke v. Lord*, 2 Dowl. 55; *Haythorn v. Bush*, 2 Dowl. 641; 2 C. & M. 689.

(c) *Bateman v. Farnsworth*, 29 L. J. Ex. 365.

(d) *Tooke v. Finley*, Rowe Rep. 426; *McLaughlin v. Hammill*, 22 Ont. R. 498.

(e) *Warnock v. Leslie*, 10 Ir. R. C. L. 68.

interplead, upon the landlord of the debtor serving a notice claiming a year's rent (*f*).

It would seem that a landlord cannot be a claimant in a stakeholder's interpleader, until a legal step by distress or otherwise has been taken (*g*).

It frequently happens, upon a sheriff's interpleader, that, in addition to the execution creditor and the adverse claimant, the landlord makes a claim for rent. As the landlord cannot distrain when the goods are in the custody of the sheriff (*h*), he has to fall back upon the right which is given to him by the Imperial Statute of 8 Anne, c. 14, which is in force in Ontario, and which enacts, that "no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of the Act, and the sheriff, or other officer, is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

The Statute of Anne, however, only assists the landlord when the goods seized under an execution against the tenant belong to the tenant, and does not when they

(*f*) *Nixon v. Wilks*, 4 Ir. Jur. N. S. 242.

(*g*) *Rowland v. Powell*, 1 Ridgew. 260.

(*h*) *McIntyre v. Stata*, 4 C. P. 248; *Grant v. Grant*, 10 P. R. 40.

turn out to be the property of a third party. If a sheriff interpleads, when a stranger claims the goods on the demised premises seized by the sheriff under an execution against the tenant, and the landlord gives notice that rent is owing, and the stranger eventually establishes his title in the interpleader issue, the landlord cannot have his rent from the goods if they have been removed from the premises, nor from the proceeds if they have been sold. The reason for this rule is, that notice by the landlord to the sheriff under the Statute of Anne is not equivalent to a distress, and a landlord can only distrain upon a stranger's goods while the goods remain upon the demised premises. The stranger has a perfect right to remove them at any time, or under any circumstances, in order to avoid the distress, and if distress is prevented by the sheriff seizing and selling or removing, the goods are freed from the claim for rent (i).

It follows, therefore, that when goods are sold under an interpleader order by the sheriff, and the proceeds are paid into Court, the whole proceeds should be paid in less only the expenses of possession and sale, and the landlord will only be entitled to his rent if the execution creditor succeeds in the issue, but if the stranger succeeds, the latter will be entitled to the whole fund freed from the landlord's claim (j). Where, after an interpleader order had been made, the landlord claimed his rent, and the sheriff instead of obeying the order by paying the whole fund into court, paid the landlord, and the claimant succeeded in the issue, the sheriff was compelled to repay the claimant the amount paid for rent (k).

If an interpleader issue is directed, the sheriff withdraws from possession when security is given by the claimant, and the goods are then no longer in custodia legis, and may be distrained upon by the landlord. But

(i) *Clarke v. Farrell*, 31 C. P. 584; *Beard v. Knight*, 8 E. & B. 865; *Foulger v. Taylor*, 5 H. & N. 202; and see also *Lockart v. Gray*, 2 Can. L. J. 168.

(j) *Clarke v. Farrell*, 31 C. P. 584.

(k) *White v. Binstead*, 13 C. B. 303.

if security is not given, and the goods are sold, they are not sold under the execution, but by virtue of and under the authority of the interpleader order alone, and the sale is not, except in the event of the execution creditor succeeding, a sale within the statute of Anne. When the sheriff interpleads, he ceases to be the bailiff of the landlord, as regards the goods seized, if they turn out not to belong to the tenant (*l*).

Where, after an interpleader order is made, the sheriff, with the consent of the execution creditor and the claimant, temporarily withdraws from possession, the goods are no longer in custodia legis, and the landlord may distrain upon them, although he knows that the interpleader proceedings are still pending (*m*).

After an interpleader order had been made, and pending the trial of the issue, the landlord claimed his rent, and as the execution creditor would not furnish the rent the sheriff withdrew from possession, at the instance of the sheriff the Court thereupon made an order setting aside the issue, and disposed of the sheriff's costs (*n*).

After the trial of an interpleader issue a sheriff was held not entitled to a second interpleader to test a landlord's claim, when the claim for rent was made before the first application was disposed of, and might have been brought forward then (*o*).

A sheriff cannot interplead when the goods in question are, when seized, in the possession of a landlord's bailiff under distress for rent, for they are then in custodia legis and cannot properly be taken (*p*). But where an execution creditor suggested fraud and collusion between the landlord and the debtor, his tenant, the sheriff was awarded relief, although the goods when seized were under distress (*q*).

(*l*) *Clarke v. Farrell*, 31 C. P. at p. 596, per Osler, J.; *Maclean v. Anthony*, 6 Ont. R. 330.

(*m*) *Cropper v. Warner*, 1 C. & E. 152.

(*n*) *Lawson v. Carter*, W. N. (1894) p. 6.

(*o*) *Clarke v. Farrell*, 8 P. R. 234.

(*p*) *Craig v. Craig*, 7 P. R. 209.

(*q*) *Tooke v. Finley*, Rowe Rep. 426.



It has been suggested that if the goods are a stranger's the landlord's duty is to distrain, even although taken by the sheriff, because if the goods are not the property of the execution debtor, the sheriff is a wrongdoer, and the goods in such a case are not protected by the execution (*r*). It may be remarked, however, that an attempt to follow this rule will cause certain difficulties to arise, for how can the landlord determine at the outset whether the goods belong to the tenant, who is the debtor, or to the stranger claiming them, as this is the very question to be tried on the issue; and how can the goods be distrained if they are under seizure by the sheriff, and so in custodia legis?

It has also been said that the right of the landlord to compel the sheriff to make the rent, depends on the legality of the seizure, and where the execution is against the stranger's goods, that is, against the person who is not the tenant, and it turns out as a result of the interpleader contest that the goods are subject to the execution, and so do not belong to the tenant, the landlord will, nevertheless, in such case have his rent out of the stranger's goods (*s*).

R. J. MACLENNAN.

(*r*) *Clarke v. Farrell*, 31 C. P., at p. 599. per Wilson, C.J.

(*s*) *Hughes v. Smallwood*, 25 Q. B. D. 306.

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## ESTOPPEL : PURCHASER FOR VALUE WITHOUT NOTICE.

Much difficulty will be encountered in dealing with the authorities upon this subject, unless careful distinction be made between cases in which the defence of purchaser for value without notice was offered:

1. To a bill appealing to the old auxiliary jurisdiction of the Court of Chancery, and,

2. To a bill seeking relief. The learning, as to the former class of cases, has been displaced by the provisions of the Judicature Acts; while, as it seems to the present writer, a large part of the learning, as to the latter class, must be merged in, for it forms part of, the law of estoppel. Purchaser for value survives only in its association with the legal estate—an unhealthy conjunction, from which longevity, luckily, cannot be expected.

*Auxiliary Jurisdiction.*—A defendant at law often found it necessary, for the proper conduct of his case, to obtain discovery from the plaintiff. As, in the earlier days, the practice at law made no provision for such discovery, the defendant was driven to the Court of Chancery, where he filed his bill in aid of his defence at law. To such a bill the plea of purchaser for value without notice was a sufficient defence. The Court, in effect, held that it would do nothing that might affect the prospects, in another Court, of a man who was a purchaser for value without notice (*a*). The Court made

(*a*) There was some doubt as to whether the plea was effectual if the plaintiff had the legal estate, and the defendant only the equitable. In the 14th ed. of Sugden's Vendors and Purchasers, vol. II., 584, et seq., will be found a strong argument in favour of the proposition that equity "regards not the quality of the estate, but the character of the person," by which is, of course, meant his merits. See also per Lord Cranworth, in *Colyer v. Finch*, 5 H. L. C. 920 (1856). If the plaintiff had not the legal title, it seems to have been immaterial whether or not the defendant had it: *Bowen v. Evans*, 1 J. & L. 263, 264 (1844); *Hunter v. Walters*, L. R. 11 Eq. 314 (1870).

no investigation into the merits of the case, or the rights of the parties. It was not called upon, and, in fact, held that it had no jurisdiction to do so.

*Concurrent Jurisdiction.*—It will readily be seen that the Court could not maintain this attitude when it was asked not to assist in the conduct of a suit in another Court, but itself to decide the suit, and, for that purpose, to adjudicate upon the rights of the litigants.

For example, two mortgagees are claiming priority over one another. No. 1 brings ejectment, at law, against No. 2; and No. 2, in aid of his defence, files a bill against No. 1 for discovery. The bill will be dismissed, if the defendant in it (No. 1) be a purchaser for value without notice. Nothing is decided, except that equity will not help No. 2, in his defence in the ejectment suit.

But, if No. 2's bill had sought relief, and not merely discovery—had prayed for foreclosure, for example—the Court would have had to pass upon the merits of the case; and it would not be prevented from doing so by proof that the defendant was a purchaser for value without notice. That fact would not be ignored by the Court. It would be taken into account, and given its proper effect in considering the right to priority. It did not oust jurisdiction (b).

*The Judicature Act.*—The Judicature Act, by giving to one Court complete control of all causes of action, has terminated the auxiliary jurisdiction of the Court of Chancery. The plea, therefore, can no longer have the effect of ousting jurisdiction. For the future its role is to influence the decision upon the merits, so far as it can (c).

(b) Some of the cases are: *Williams v. Lambe*, 8 Bro. C. C. 264; *Collins v. Archer*, 1 R. & M. 284; *Phillips v. Phillips*, 4 DeG. F. & J. 208; *Stackhouse v. Countess of Jersey*, 1 J. & H. 721; *Colyer v. Finch*, 19 Beav. 500; 5 H. L. C. 905; *Newton v. Newton*, L. R. 4 Ch. 144; *Frazer v. Jones*, 17 L. J. Ch. 353; *Heath v. Crealock*, L. R. 10 Ch. 22; *Ind v. Emmerson*, 33 Ch. D. 323; 12 App. Cas. 300 (1886); *Cave v. Cave*, 15 Ch. D. 639 (1880).

(c) *Re Cooper*, 20 Ch. D. 611 (1882); *Walsh v. Lonsdale*, 21 Ch. D. 9 (1882); *Ind v. Emmerson*, 33 Ch. D. 323; 12 App. Cas. 300 (1886).

*The Present Position.*—Having thus got rid of that portion of the law relating to purchaser for value without notice, which played its part within the orbit of auxiliary jurisdiction, there remains to point out, that another large part of that law is, in reality, a part of the law of estoppel.

In contests for priority, he who is first in time, ought, upon general grounds, to be entitled to the estate in dispute. This priority may be affected in two ways: (1) A subsequent purchaser may (a) have acquired the legal estate, and (b) be a purchaser for value without notice; or (2) a subsequent purchaser may (a) have been misled by the first purchaser (be entitled to set up estoppel as against him), and (b) be a purchaser for value without notice. The position of a purchaser for value without notice is one-half of each of these legal situations, and, as such, must yet be reckoned with. A few words as to each of them:

1. *Legal Estate.*—According to the maxim (now nearly ready for sepulchre), “Where the equities are equal, the law will prevail,” a subsequent mortgagee may pull himself into first place, by a successful clutch at the legal estate. But this legal estate is only one-half of his equipment. It is the objective phase of his condition; requiring for its complement the subjective attitude of a purchaser for value without notice. Or, to put it the other way, “Being purchasers for value without notice, they cannot succeed unless they can make out, that, having an inferior equity, they have clothed it with the legal estate” (d).

The man is no use without the clothes; nor are the clothes without the man.

*Estoppel.*—Recalling the fundamental principle of estoppel, as laid down in the leading case of *Pickard v. Sears* (e) (“Where one, by his words or conduct, wilfully

(d) Per Kay, L.J., in *Powell v. London*, 2 Ch. 564 (1893). See also *Phillips v. Phillips*, 4 DeG. F. & J. 208; *Cave v. Cave*, 15 Ch. D. 639 (1880); *Hampton v. Swansea*, 19 Ch. D. 207; *Roots v. Williamson*, 38 Ch. D. 485 (1888); *Powell v. London*, 2 Ch. 564 (1893); *Forse v. Sovereign*, 14 App. R. 482 (1887); *Utterson v. Rennie*, 21 S. C. R. 218 (1892).

(e) 6 A. & E. 469 (1837).

causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded," etc.), it is apparent that estoppel depends, (1) not only upon the existence of a misrepresentation, by one person, but also (2) upon its effect upon the other person. It is immaterial that the one was guilty of misrepresentation, if the position of the other remained unaffected by it.

In order, therefore, to estop a first purchaser from setting up his priority, (1) he must have been guilty of misrepresentation with reference to it; and (2) his opponent must be one who has changed his position upon the faith of the misrepresentation, that is, without knowing of the existence of the prior title, that is, he must be a purchaser for value without notice. In his case the misrepresentation is the objective half of the situation, and there is the same subjective complement—purchaser for value without notice.

But we are travelling a little too fast. It is not true (as we have assumed) that everyone who "changes his position" can be spoken of as a "purchaser." Benefits derivable from estoppel are not confined to purchasers, but are extended to every one who "upon the faith," etc., "changes his position." The wider phrase is, therefore, for estoppel, the better; the more circumscribed one should vanish.

*Generally.*—We now see that purchaser for value without notice is not of itself a defence, and never was (except when pleaded to the auxiliary jurisdiction of the Court of Chancery). It is merely one-half of another defence.

For example, to a bill by a first mortgagee praying foreclosure, it is no defence for a subsequent encumbrancer to say that he was a purchaser for value without notice—that is, only half of a defence. He wins only if he can prove another half: (1) Legal estate, or (2) misrepresentation. Coalition with the latter is estoppel. And combination between it and "one who changes," etc., is also estoppel; and includes such coalition.

*Summary.*—Summarizing, then, we may say, as to purchaser for value without notice:—

1. That it is not, and never was (save in appeals to auxiliary jurisdiction), more than one-half of an effective legal situation.

2. That as a defence to an appeal to auxiliary jurisdiction, it has been rendered obsolete by the Judicature Acts.

3. That as one-half of estoppel, it ought to be superseded by the wider phrase: "One who changes his position upon the faith of the misrepresentation."

4. That in conjunction with the legal estate, it may yet be considered to have such vitality, as the absurd deference still paid to that sort of an estate, as against other sorts of estates, still procures for it.

5. And that when by Registry Acts; Torrens Systems; Statutes (such as the Imperial Act 37 & 38 Vict. c. 78, s. 7—too hastily repealed); or the final success of reason in its eternal struggle with grandfathers, the magic adhering to legal estate, is stripped from it, the venerable old purchaser for value without notice will be ready for his everlasting interment. That he should ever have been born, and received into learned and cultured society, is good evidence that those social qualifications are of highly relative character. He has, lately, become obnoxious to polite sensibilities; his remaining influence is pernicious; his funeral will be "a happy release," not only for him, but for us.

JOHN S. EWART.

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**EXECUTORS' PETITION FOR ADVICE.**

By the Trustees and Executors Act, R. S. O. c. 110, s. 37. "Any trustee, executor or administrator shall be at liberty, without the institution of an action, to apply by petition to a Judge of the High Court, or by summons, upon a written statement to any such Judge in Chambers, for the opinion, advice or direction of such Judge on any question respecting the management or administration of the trust property, or the assets of a testator or intestate." The certificate of counsel is to accompany the petition or statement. And "the trustee, executor or administrator, acting upon the opinion, advice or direction given by the Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject matter of the said application." Provision is then made to exclude the protection, if fraud has been used. Under a mistaken view of the scope and intention of this clause petitions have occasionally been presented for the interpretation of wills. The ground usually alleged on behalf of the executor was that he could not make administration of the assets without certainly knowing how the property was to be distributed; and he could not know who was entitled to share in the distribution, or in what proportions, or to what extent, without ascertaining that fact by an interpretation of the will. These applications have been uniformly unsuccessful. Not only have the Courts declined to interpret wills and settlements, but they have avoided giving advice in almost every case, and have discouraged, rather than encouraged, applications under the Act.

In the last revision of the rules of practice, the practice of originating notices has been introduced by Rule 938, which permits questions to be brought before the Court upon a notice of motion without action. The

scope of the new rule is very wide, and may to a large extent supersede the enactment in question. Of that a later enquiry may be made.

Although the practice in this Province has been uniformly observed that the construction of a will or settlement will not be undertaken on such a petition, and the rule has so been stated in England, yet several cases are reported in which an opinion on construction was given.

The points in these cases were not strictly questions of interpretation, but raised questions of law rather than of advice.

The first case was *Re Muggeridge's Trusts* (a). A settlement gave the property in question to A. until he became bankrupt or insolvent. A. made a composition with his creditors, and the question to be determined was whether this was becoming insolvent within the meaning of the settlement, so that the property went by the limitation in the deed to the next person entitled. The Court determined that A. had become insolvent. This was partially a question of interpretation, but partially also one of fact.

In *Re Spiller* (b), a wife entitled to the income of a fund under settlement became of unsound mind. The husband was unable to support her out of his earnings, and the trustees asked the advice of the Court as to whether the income should be paid to the husband on his undertaking to expend it on behalf of his wife. The order was made. This was hardly a question of interpretation, but rather of the legal effect of an admitted interpretation.

First, as to practice. In presenting a petition there must be no disputed question of fact, no contention between parties. No affidavits can be read on the petition. "The intention of the Act is plainly to enable a trustee to obtain the opinion of the Court on his own statement of the facts, and affidavits are not admissible (c). And

(a) *Johns*. 625.

(b) 2 L. T. N. S. 71.

(c) *Re Muggeridge's Trusts*, *Johns*. at p. 626.



consequently no reference will be ordered for the purpose of enquiring into facts (*d*). The complete absence of any contest as an element in the disposition of the subject matter of a petition is also apparent from the practice as to service outlined by Page Wood, V.-C., in *Re Muggeridge's Trusts*, where His Honour states that the proper course is not to serve any parties, but to present the petition *ex parte* in the first instance at Chambers, and then apply, if necessary, for a direction to the persons whose interests require them to be notified.

As to the nature of the application. By the Imperial Act application may be made to one of Her Majesty's counsel, and, therefore, it is a pure question of obtaining advice. In *Re Dennis* (*e*), Vice-Chancellor Stuart stated "that he hoped all classes of the profession would consider well how they acted on this clause, for he had had long statements of facts submitted to him in Chambers with which he had entirely declined to interfere, for he was certain it was not the intention of the Legislature to turn judge's chambers into counsel's chambers." He further stated that he was speaking in the presence of a member of Parliament, which body had seemed to overlook the fact that there was a large body known as the Bar of England, whose duty it was to advise. Malins, Q.C., who was present, then stated that the Legislature had not overlooked the Bar, as the petition could be referred to a Queen's Counsel. The matter of the petition must, therefore, be purely of an undisputed, or rather accepted, statement of facts, and must ask simply for advice or opinion.

So, in *Re Mockett's Will* (*f*), there were seven questions presented for the opinion of the Court, some involving interpretation and the settlement of disputed points of law, and others the distribution of assets. The Court refused to answer them, unless the parties would accept the Judge's opinion, as there were conflicting de-

(*d*) *Re Mockett's Will*, Johns. 628.

(*e*) 5 Jur. N. S. 1388.

(*f*) Johns. 628.

cisions to be considered, and there was no appeal from his opinion or advice. A bill was recommended.

Again, in *Re Barrington's Settlement* (g), Page Wood, V.-C., said, "This is not a case in which I can properly give an opinion . . . but I have no objection to express my view as to the principle involved. My reason for not giving an express opinion is that the case goes into details with which the Court cannot effectually deal, without having a superintending power and being informed by affidavits; whereas, under the statute the facts must be taken to be as they are stated in the petition of the trustees, who take the risk of any misstatement; and the Court has no means of exercising any controlling power over the subject matter. . . . But I have no means of ascertaining the facts beyond the mere statements of the petition; and if I were to give an affirmative answer, I should be sanctioning the outlay of a definite sum of money without any investigation or affidavit as to the propriety of the expenditure, or any power of control over it." The advice asked was as to whether trustees should make permanent improvements, on land purchased under a settlement, with the residue of the money of the settlement.

The purpose or object of the Act was explained by the Master of the Rolls in *Re Hooper* (h) to be to assist trustees in the execution of the trusts as to little matters of discretion; and that this was not a case of that description. That when, as in this case, a question arose as to the effect of a limitation in an instrument, it ought, for the assistance of the Court, to be argued by the opposite parties."

And again, by Stuart, V.-C., "It appears to have been the intention of the Legislature in passing this Act that trustees who were in any difficulty, in cases where there was no suit, and no contention between the parties, might have an opportunity of resorting to a Judge in Chambers for his advice. But it was quite plain that

(g) J. & H. 142.

(h) 29 Beav. 656.

this was a jurisdiction which must be exercised only with the greatest caution " (i).

And again in *Re Lorenz' Settlement* (ii), Vice-Chancellor Kindersley said, "My understanding of that section of the Act is, that it was intended by the Legislature that the Court should have the power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties inter se, otherwise the effect would be that a deed or will involving the most difficult questions, and relating to property to an amount however large, might be construed and most important rights of parties decided by a single Judge, without any power of appeal whatever. This, I am satisfied, the Legislature never intended. . . . It is true, that, in some cases, the Court has (unadvisedly, as I think,) upon a petition under this section, given its opinion on questions affecting the rights of parties. But I believe that the Judges generally now consider that it ought not to be done."

As the advice, if given, is necessarily applicable only to the state of facts presented, if there has been any misstatement, or slip, however innocent, the opinion or advice will be no protection (j).

It will thus be seen that the Act is not designed to settle or even enquire into facts; nor to determine questions of law on the construction of wills or settlements; nor to settle the rights of parties. The Courts have discouraged rather than invited the presentation of petitions, and have but rarely given the advice asked, while, in giving advice, the greatest caution has been observed by them. Thus, in *Re Simson's Trusts* (k), where the trustees of a settlement were in doubt as to whether they should invest in freehold securities or in East India stock or railway debentures, the Judge whose

(i) *Re Dennis*, 5 Jur. N. S. 1388.

(ii) 1 Dr. & Sm. 401.

(j) *Re Barrington's Settlement*, 1 J. & H. 142; *Re Dennis*, *supra*.

(k) 1 J. & H. 89.

opinion was asked said that he would answer as if he were a trustee going to invest, and would invest in freehold securities, and leave the rest of the question unanswered.

There remains a case for notice which at first sight seems to differ in principle from those already cited, if, indeed, they can be said to depend upon principle. The case is *Re Beddoe* (1). The question at issue was as to the right of a trustee to claim out of the trust estate the costs of an unsuccessful defence of an action for detinue of deeds by a tenant for life. The tenant for life was held entitled to the deeds, and the report shows a very carelessly managed defence of the action. The Court of Appeal made some remarks which would lead one to suppose at first sight that in bringing or defending actions a trustee ought first to ask the advice of the Court on an originating summons. While many matters may be brought before the Court on such a summons, amongst them the asking of advice under this enactment, it does not follow that in the absence of the practice as to originating summonses, the Court would entertain a petition under the enactment in question. The remarks of Lord Justice Lindley, at p. 557, are as follows: "But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion. . . . If, indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by an originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any Judge would have authorized him to do so." And Lord Justice Bowen, at p. 562: "If a trustee is doubtful as to

(1) L. R. 1893, 1 Ch. 547.

the wisdom of prosecuting or defending a law suit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned."

That this cannot be intended to refer to the cases of petitioning for advice seems clear, for the following reasons: The facts in such a petition must be undisputed, and where litigation is threatened, or to be undertaken, it involves almost certainly a dispute of facts. The cases must be rare in which litigation will not involve them. Again, if any misstatement should be made, the leave would not protect the trustee. He would thus be in the unfortunate and impossible position that he must take the advice of the Court on a true statement of facts, and if he does not truly, perhaps where impossible, state the facts he is not protected. And if he cannot state the facts, how can he inform the Court? The case in hand was a very obvious one, but all cases are not so obvious. In other words, where the case is not an obvious one the Court would subsequently allow the trustee the costs, because it would have permitted the action or defence on a doubtful case (*m*). But where the case is an obvious one, and the trustee ought not to have defended or brought the action, he will not be allowed his costs. In either case why make the prior application. If the case is an obvious one, the trustee ought not to incur the expense. If not, he should go on. It is imposing a hardship on trustees to compel them truly to state the facts on pain of giving no protection if they do not, when, as a matter of ordinary reasoning, if the facts were truly known, there would be no need of advice. It seems, therefore, that this case cannot be intended to apply to that place of an executor's application for advice or direction.

(*m*) See *Howe v. Earl Dartmouth*, 7 Ves. at p. 150.

## EDITORIAL REVIEW.

**Judicial Salaries.**

Inasmuch as a salary for the fifth Judge of the Court of Appeal of Ontario, to be appointed in order to bring the Court up to the strength required by the Act of last session, will probably be provided at the next session of the Parliament of Canada, it may not be out of place to call attention to the anomalous state of the salaries of the Judges in Ontario, as regards their relation to each other in the several Courts, and also to the question of the amounts of salaries generally and retiring allowances.

The fact is beyond all dispute that the present judicial salaries are too low. It has over and over been pointed out that they are out of all proportion to the incomes earned by the leaders of the Bar, and even compare unfavourably with the incomes made by those in the second rank. The answer to this used to be that it was not expected that leaders of the Bar would go upon the Bench, and that the comparison was unjust. But the answer is no answer, for it is not a question of inducing leaders of the Bar to go upon the Bench, but of enabling a Judge who necessarily moves a great portion of his time amongst the leaders of the Bar, to maintain in a proper manner the position in which he is placed. It is only after a barrister has made himself to a certain extent independent that he can safely afford to accept a judicial salary.

Then, as to the relative salaries of the Judges of the Court of Appeal and the High Court. It is undoubtedly desirable that a Judge, who, after a long experience on the Bench, commands universal respect for his ability and learning, should be eligible for removal into the Court of Appeal. It affords not only a more dignified position, but removes a Judge from the excitement, and sometimes

the annoyance, of circuit work, and enables him in a calmer atmosphere to devote his talents to the public service. And yet a Judge of the High Court must make a financial sacrifice if he is removed into the higher Court. With regard to the Chief Justices and Chancellor, there are other considerations which interfere with their removal, namely, the loss of rank or title, except in case of appointment to the Chief Justiceship of the Court. But with regard to the Justices of the High Court, not one of them could accept a seat in the Court of Appeal without a loss of many hundred dollars annually. This is entirely wrong, and because wrong indefensible. The salaries should be so arranged that there should, at any rate, be no loss; better, so that there should be a slight gain.

While the salaries are so small that nothing but the most economical management will make them sustaining, a fortiori is it so when a Judge, after years of service, on account of failing health, has to retire on the mercy of the Crown and two-thirds of a salary which he found before his retirement altogether too small. When a Judge has need to retire on account of incapacity from failing health, provision ought to be made for his retirement on an allowance equal to his full salary. This would occur so seldom that no appreciable burden would be laid on the exchequer. A similar arrangement might also well be made in the case of unusually long service. Objections have been raised to this proposal, which is not new, for the reason that a Judge who could not justify his retirement on the ground of ill-health, might linger on after his energy had been exhausted in order to gain the full allowance on retirement. This is not complimentary to the Judges. The rule need not be a rigid rule, but might, if thought necessary, be subject to proper regulation or qualification. But at present there is no power to grant more than two-thirds in any case, and no obligation to do that. A complete revision of judicial salaries on these lines would be highly appreciated.

**Service upon Town Agents.**

Our attention has been directed to the provisions of Rule 329 as to service of papers upon solicitors. It appears that where the solicitors both live in the same county town service is frequently made on their Toronto agents. This is the daily practice in Toronto. Notices of motion, appointments, warrants, copies of orders, demands for copies of affidavits, the copies themselves, are all served daily by Toronto agents on Toronto agents, though the solicitors may live in the same county town.

Our correspondent questions the regularity of this practice, and refers to the wording of the rule. The rule provides (1) that all writs, pleadings, etc., which do not require personal service upon the party shall be served upon his solicitor when residing in Toronto; or (2) if his solicitor does not reside in Toronto (a) then upon his solicitor (qu. wherever he may happen to reside); or (b) if the solicitor does not reside in the county where the proceedings are conducted, or resides in a part of the county not the county town, then upon the agent named in the County Town Solicitors' and Agents' Book, provided by Rule 92, or upon the Toronto agent—unless a direction or order is made as to service.

The point made by our correspondent is that Rule 329 expressly and unequivocally requires service on the solicitor in every case, except those provided by the rule. Thus the first part of the rule requires in general terms service on the solicitor, if he resides in Toronto; the next step is, that if he does not reside in Toronto still the solicitor must be served. Therefore, if two solicitors practice in a county town all papers must be served upon them personally or at their offices in the county town, unless the rule allows other service. But the rule does not allow other service. If the solicitor does not reside in the county, or if he resides in the county, but not in the county town, then, and then only, can papers be served on his agent in the county town under Rule 92, or upon the Toronto agent. Rule 90, which provides for a Toronto agents' book, says nothing about service upon Toronto solicitors or agents. Rule



91 requires every practising solicitor to have a Toronto agent; but it says nothing about service, and leaves Rule 329 to define where and under what circumstances the Toronto agent may be served, and that is, only where the solicitor does not reside in the county or county town.

The result is that when the solicitors live and practise in a county town service on them alone is good service, and service on Toronto agents is not service at all within the rule. This evidently never was intended, for one could not conceive a more inconvenient arrangement. For instance, on a pending motion in Toronto copies of affidavits served in Toronto are not well served, though the only person to use them is the Toronto agent. To effect proper service they would have to be sent to the solicitor in the county town for service in the county town, and then be sent back to Toronto. We have been unable to find in the rules any answer to the position taken by our correspondent. Perhaps some more active practitioner can do so. At any rate the rules might be simplified, and so improved in their phraseology.

#### **Service by Mailing.**

Another, equally important, question arises under Rule 331, which provides for mailing papers where the solicitor's office is closed. The rule might quite properly have been made applicable to the agents of solicitors for the party as well as to solicitors. For instance, if the solicitor's office is closed, you may serve by mailing; but if you cannot serve the solicitor, but must serve his agent, and if the latter's office is closed, you cannot serve by mailing. There is no reason for the distinction. If it is beneficial and safe practice in one case, it is so in the other.

But a curious and glaring patent defect stands out on the face of the rule which may lead to disastrous results. The real literal meaning of the rule, as at present drawn, is simply a rule to permit service by mailing after office hours. Of course, the draftsman will exclaim, that never was meant. We may probably agree. But that is what

is said. Probably what was meant (though we have no right to say so in the face of the rule) was that where attendance is made to serve a paper within the hours for service, and the office is closed, service may be effected by mailing. But the rule distinctly applies to cases where the solicitors have left and closed their offices for the day and is not limited to the hours for service.

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## BOOK REVIEWS.

*A Compendium of the Law relating to Executors and Administrators*, with an appendix of Statutes, annotated by means of references to the text. By W. GREGORY WALKER, B.A., author of the first edition of this work, and of "Partition Acts, 1868 and 1876," and EDGAR J. ELGOOD, B.C.L., M.A., both of Lincoln's Inn, Barristers-at-law, and late scholars of Exeter College, Oxford, joint authors of "The law relating to the Administration of Estates of Deceased Persons." Third Edition. \* By EDGAR J. ELGOOD, B.C.L., M.A. London: Stevens & Haynes. 1897.

The usefulness of this work has already been tested. A smaller and less discursive work than Williams on Executors, it contains in a concise and compact form a vast amount of law of a practical kind.

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*A Manual of Medical Jurisprudence.* By ALFRED SWAINE TAYLOR, M.D., F.R.S. Revised and edited by THOMAS STEVENSON, M.D., LOND., F.R.C.P., etc., etc. Twelfth American, edited with citation and additions from the twelfth English edition. By CLARK BELL, Esq., LL.D., President of the American International Medico-Legal Congress of 1889, etc., etc. New York and Philadelphia: Lea Bros. & Co. 1897.

Notwithstanding the appearance of other works Taylor's Medical Jurisprudence remains an interesting, comprehensive and reliable work. The present edition deals largely with the blood-corpuscles of man and many other animals, and contains a number of plates showing the relative sizes of each, together with tables of measurements. Inebriety and responsibility, and medico-legal surgery are also largely dealt with. In the latter two

branches a great deal of reseach is shown and very many modern authorities are cited.

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*Ontario Game and Fishing Laws.* A digest of the whole law, Provincial and Dominion, etc. By A. H. O'BRIEN, Barrister-at-Law, Assistant Law Clerk of the House of Commons. Third edition. Issued under the authority of the Ontario Fish and Game Commissioners. Canada Law Journal Co. 1897.

The appreciation of this manual by the Game Commissioners is evidence of the usefulness of prior editions. In all respects this edition keeps up to the standard, and affords a ready reference to all the laws on the subject.

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THE  
CANADIAN.  
LAW TIMES

NOTES OF CASES  
AND  
INDEX-DIGEST FOR 1897.

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**Edited by**

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# THE CANADIAN LAW TIMES

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## OCCASIONAL NOTES.

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Supreme Court of Canada.

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ONTARIO.]

[9TH DECEMBER, 1896.

NIAGARA DISTRICT FRUIT GROWERS' ASS'N v.  
WALKER.

*Principal and surety—Guarantee bond—Fidelity of principal—Principal's default—Duty of creditor to disclose.*

W. was appointed in 1891, by instrument in writing, agent of a company to sell its fruit, giving a bond, with sureties, conditioned for the faithful discharge of his duties, and prompt return of moneys collected on sales. At the end of the year the bond was given up and a new bond executed by W. and the same sureties, for the next year's business, and the same course was pursued for three years more. W. was in arrears to the company every year, and represented that it was due to slow collections, although, by the terms of his appointment, he could only sell for cash. The arrears were always made good by W. giving an indorsed note, which the company accepted. At the end of 1894 the company discovered that the default had not been caused by slow collections, but that W. had received moneys which were not remitted; and for the balance due on that year's business an action was brought against the sureties.

*Held*, reversing the judgment of the Court of Appeal, 28 A. R. 681, 16 Occ. N. 844, that the appointment of W. as agent

for each of the four years was an independent appointment; that the position of the sureties for 1894 was the same as if other persons had been sureties in the preceding years; and that the company was under no obligation to disclose to the persons signing the bond for 1894 the default of the preceding year; nor was the non-disclosure a representation that W. had punctually performed his undertakings in respect of such previous employment.

*Moss, Q.C., and G. W. Meyer, for the appellants.*

*E. D. Armour, Q.C., for the respondents.*

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### FARWELL v. JAMESON.

*Landlord and tenant—Distress—Goods of stranger—Construction of R. S. O. c. 143, s. 28—Holding “under” tenant—Estoppel.*

By s. 28 of the Landlord and Tenant Act, R. S. O. c. 143, only the property of the tenant or person liable for the rent shall be distrained upon. The word “tenant” in the Act includes a sub-tenant, assignees of a tenant, and a person in actual occupation under or with consent of the tenant. A property under lease was assigned by way of mortgage, and the mortgagees took possession and gave the keys to a house-agent so that he could show the premises with a view of letting them. The house-agent, without any authority so to do, let into possession a firm of dealers in pianos, and the stock they placed in the premises was distrained upon for arrears of rent under the original lease.

*Held*, reversing the judgment of the Court of Appeal, 28 A. R. 517, 16 Occ. N. 211, and of the Queen’s Bench Divisional Court, 27 O. R. 141, 16 Occ. N. 51, that the property was not liable to seizure; that it could only be liable as property of persons in occupation “under” the assignees of the tenant, and these persons were not so in occupation; and that, though in an action of ejectment or trespass they might be estopped from denying that they held under the assignees, that would not bring them within the terms of the Act; they must hold under the tenant in point of fact.

*Laidlaw, Q.C., for the appellants.*

*Kilmer, for the respondent.*

## MOLSONS BANK v. COOPER.

*Collateral security--Proceeds received by creditor--Appropriation--Res judicata--Estoppel--Suspense account--Banks.*

C. had a line of discount with a bank on terms of depositing customers' notes as collateral, and having failed owing a large amount for discount, about three-fourths of which was secured as agreed, the bank sued and obtained judgment on his notes discounted, as they matured. C., then, claiming the right to have the amounts realized from the collaterals credited to him, obtained from a Divisional Court an order directing the trial of an issue upon the question whether, before or since the recovery of said judgments, the bank had received any payments which ought to be applied in or towards satisfaction thereof, and if so, when and to what extent. The bank, while admitting the receipt of a considerable portion of the collaterals, claimed the right to exhaust all other means of obtaining payment of its debt before crediting the money so received, and the decision on the trial of the issue was that no money had been received which it was bound to apply in satisfaction of the judgments. After the last of the discounted notes had matured, the bank sued C. on them, and the question of applying the proceeds of the collaterals was again raised, it being contended that, at all events after all the debt had matured, the bank was bound to appropriate. It was again decided in favour of the bank, not only on the question of law, but also on the ground that it was *res judicata* by the decision on the issue.

*Held*, reversing the judgment of the Court of Appeal, 28 A. R. 146, 16 Occ. N. 85, that the matter was not *res judicata*; that, under the Judicature Act, *res judicata* as a defence, or reply to a counter-claim, must be specially pleaded; and if not, as the questions in litigation in the action were not identical with those involved in the issue, though depending on the same principle of law, the decision might be binding on inferior tribunals and Courts of co-ordinate jurisdiction, but would not be binding as *res judicata* on Courts of appellate jurisdiction.

*Held*, further, that though the bank was not obliged, so long as the collaterals remained in its possession uncollected, to give any credit in respect of them, when it received payment of such collaterals or any part of them, it operated at once as a payment of the principal debt.

*Foy, Q.C.*, for the appellants.

*Shepley, Q.C.*, for the respondents.

## ONTARIO.

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### Supreme Court of Judicature.

### HIGH COURT OF JUSTICE.

[BOYD, C., ROBERTSON, J., MEREDITH, J., 7TH NOVEMBER, 1896.]

#### SPEERS v. SPEERS.

*Surrogate Courts—Vacancy in office of senior County Court Judge—Case heard by junior Judge—Delivery of judgment after appointment of new senior Judge.*

Where a junior County Court Judge has heard the evidence and tried an issue in a Surrogate Court, during a vacancy in the office of senior County Court Judge, no request from the new senior Judge, when appointed, is needed to enable him to fulfil the judicial responsibility undertaken by him of not only hearing but determining the contest, and no intervention by the new Judge is necessary to give him jurisdiction to the end; and he has jurisdiction to deliver judgment after the appointment of the new senior Judge.

*Garrow*, Q.C., for the plaintiffs.

*Osler*, Q.C., for the defendant Joseph Speers.

*Malcomson*, for the other defendants.

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[BOYD, C., FERGUSON, J., ROBERTSON, J., 12TH DECEMBER, 1896.]

#### CAMPAU v. RANDALL.

*Notice of trial—Irregularity—Close of pleadings—Order staying proceedings—Chambers motion—Reference to trial Judge—Order—Judgment—Appeal.*

On the 21st March, 1896, the defendant appeared, delivered a defence, and issued and served an order for security for costs,

which imposed a stay of proceedings. On the 2nd October, 1896, the plaintiff complied with the order by filing a bond, and on the 8rd October gave notice of trial.

*Held*, that the notice of trial was irregular, the pleadings not being closed when it was given.

A motion made in Chambers by the defendant to set aside the notice of trial was referred to the Judge at the trial, who dismissed it. The defendant thereupon withdrew, and the action was tried in his absence, and judgment given for the plaintiff.

*Held*, that the Judge, when disposing of the motion, was sitting and acting as a Judge of Assize, and that this and the trial of the cause might properly be deemed one proceeding; and one appeal, comprehending all, was sufficient.

*Wallace Nesbitt*, for the plaintiff.

*L. G. McCarthy*, for the defendant.

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[BOYD, C., 17TH DECEMBER, 1896.]

### CARRIQUE v. BEATY.

*Promissory note—Alteration after maturity—Signature by new maker—Release—Time—Presentment—Delay—Prejudice—Continuing security.*

A promissory note, payable one year after date, was made by two persons, one signing for the accommodation of the other. After maturity the note was signed by a third person as a maker, with the object of giving additional security to the holder.

*Held*, that the third person was to be regarded as an indorser, and his signature did not constitute an alteration in the note such as would discharge the original accommodation maker; and, upon the evidence, that there was no agreement to give time for payment which would discharge him, if regarded as a surety.

*Kinnard v. Tewsley*, 27 O. R. 398, distinguished.

*Held*, also, that, treating the last signer as an indorser on a note payable on demand, it was not shown that he had been prejudiced by non-presentment for payment prior to this action.

the instrument having been dealt with as a continuing security, and there having been no unreasonable delay in presentment.

*J. W. Elliott*, for the plaintiff.

*J. C. Hamilton*, for the defendant James Beaty.

*E. W. Boyd*, for the defendant John Albert Beaty.

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[MEREDITH, C.J., 18TH DECEMBER, 1896.]

*In re* HOOPER.

*Settled Estates Act—Sale of vacant land—Life tenant—Income—Taxes—  
Infant—Maintenance.*

The Settled Estates Act was intended to enable the Court to authorize such powers to be exercised as were ordinarily inserted in a well drawn settlement, and ought accordingly to receive a liberal construction.

Where the widow of the settlor was entitled to the whole income of the estate for her life, not charged with the support and maintenance of the children, who were the remainderment an order was made, upon the petition of the widow and adult children and with the approval of the official guardian, authorizing the sale, in the widow's lifetime, of vacant and unproductive land forming part of the estate, notwithstanding that the effect would be to relieve the widow of the annual charge upon such land for taxes, to add to her income the profit to be derived from the investment of the proceeds of the sale, and to deprive the remaindermen of the benefit of any increase in the value of the land; the price offered being the best obtainable at the time, or likely to be obtained in the near future; the Court deeming the sale in the best interests of all parties; and the widow agreeing to charge her income from the settled estates with the obligation of maintaining the infant remainderman.

*J. E. Jones*, for the petitioners.

*J. Hoskin*, Q.C., for the infant.



[ROSE, J., 19TH DECEMBER, 1896.]

HESSELBACHER v. BALLANTYNE.

*Sale of goods—Executory contract—Possession—Non-payment of price—Loss of goods—Liability.*

Where goods, the subject of an executory contract of sale, have passed into the possession of the vendee, without payment therefor being made, and have, while in such possession, been lost or destroyed, through no fault of the vendor, the vendee is liable for the price, notwithstanding that the property in the goods had not, by the terms of the contract, passed to the vendee, and notwithstanding that no negligence on his part is shown.

*Rodd*, for the plaintiff.

*W. H. Hearst* and *J. McKay*, for the defendant.

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IN CHAMBERS.

[ARMOUR, C.J., 27TH NOVEMBER, 1896.]

*In re* SOUTH BRANT DOMINION ELECTION.

DUNN v. HENRY.

*Parliamentary elections—Petition—Evidence—Foreign commission.*

Motion by the petitioner in the matter of a controverted election petition for an order for the issue of a foreign commission to Buffalo, in the state of New York, for the examination of witnesses for the purpose of evidence at the trial of the petition.

*L. F. Heyd*, for the petitioner.

*W. H. Blake*, for the respondent, contended that there was no power to make the order, it not being directly authorized by statute or Rule.

ARMOUR, C.J., made the order as asked, following *Re Cornwall Election Petition*, 8 P. R. 64.

[In the *London Dominion Election Case* a similar order was made on the 5th December, 1896, by MACMAHON, J., following the above decision and the *Cornwall* case.]

[MEREDITH, C.J., 15TH DECEMBER, 1896.]

KATRINE LUMBER CO. v. LIVERPOOL AND LONDON  
AND GLOBE INS. CO.

*Particulars—Pleading—Fire insurance—Proofs of loss—False and fraudulent statements.*

The defence to an action to recover the loss alleged to have been sustained by the plaintiffs by the destruction by fire of property insured by the defendants was that the plaintiffs' claim was vitiated by the 15th statutory condition to which the defendants' policies were subject, because of the following false and fraudulent statements in a statutory declaration forming part of the proof of loss: (1) that the fire originated at a specified time from the embers of a previous fire upon the same premises; (2) that the fires were not caused by the wilful act or neglect, procurement, means, or contrivance of the manager or any officer of the plaintiffs; (3) that the schedules attached to the declaration contained as particular an account of the loss as the nature of the case permitted, and that such account was just and true.

Upon an application for particulars:—

*Held*, that the plaintiffs were entitled to know what acts of omission or commission the defendants intended to charge the plaintiffs' manager with as constituting the negligence imputed to him, and in what way it was charged that the fires were caused by his procurement, means, or contrivance.

2. That as to the origin of the fire, the statement that it did not occur at the time and in the way stated, and that the untrue statement was made with intent to defraud the defendants, was sufficient information to give the plaintiffs, and the defendants could not be required to give further particulars without disclosing their evidence merely.

3. Nor should further particulars be required as to how the declaration that the fire was not caused by the wilful act of the manager was false and fraudulent. The statement that the fire was caused by his wilful act was sufficient.

4. That as to the alleged falsity and fraud of the declaration as to the extent of the loss, it was sufficient for the defendants to say that the plaintiffs had overstated by a specified sum the

loss on the whole of the articles insured, without saying by how much they had overstated the loss on each of the classes of articles.

*R. McKay*, for the plaintiffs.

*W. M. Douglas*, for the defendants.

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[FALCONBRIDGE, J., 11TH DECEMBER, 1896.]

*In re* UNDERHILL—FOX v. SLEEMAN.

*Administration order—Jurisdiction of local Master—Summary application—Action.*

An appeal by the defendant from an order of the local Master at Guelph for the administration of the estate of William Underhill, deceased, made upon the summary application of the plaintiffs, who alleged that they were the next of kin of the deceased, being children of a deceased brother. The deceased, by his will, gave all his estate to his wife, who predeceased him, and the defendant, his adopted daughter, obtained from a Surrogate Court letters of administration with the will annexed. The application for the administration order was opposed by the defendant.

*Held*, having regard to Rules 80, 188, 972, that the local Master had no jurisdiction to entertain an opposed application for an administration order; and that it was a proper case in which to direct that an action for administration should be brought.

*Moss*, Q.C., for the defendant.

*W. M. Douglas*, for the plaintiffs.

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[STREET, J., 14TH DECEMBER, 1896.]

*In re* RYAN—RYAN v. SUTHERLAND.

*Affidavit—Notary—Seal.*

Where an affidavit is sworn before a notary public in Ontario, it is not necessary to its reception as evidence that the notary should affix his official seal.

*W. E. Middleton*, for the plaintiffs.

## RENNIE v. BLOCK.

*Costs—Taxation—Chambers motion—Copies of depositions.*

In taxing the costs of a motion in Chambers, no allowance can be made for copies of depositions taken for use upon the motion.

*O'Donohoe, Q.C., for the plaintiff.*

*D. T. Symons, for the Quebec Bank, garnishees.*

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[THE MASTER IN CHAMBERS, 3RD NOVEMBER, 1896.]

*In re BENFIELD AND STEVENS.*

*Interpleader—Jurisdiction—Foreign claimants—Fund payable in foreign country.*

Under an agreement with respect to a mining property in this province, a certain royalty was payable in a foreign country to foreigners residing therein, by a person also residing therein, but was claimed by another person in the jurisdiction.

*Held*, upon an application for an interpleader order, that the Court had no power to direct foreigners to come within its jurisdiction to defend their right to the fund.

*W. E. Raney, for the applicant.*

*J. Bicknell, for the claimants Stevens and others.*

*W. H. Biggar, for the claimant Richardson.*

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NOVA SCOTIA.

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*In the Supreme Court.*

[THE JUSTICES IN BANC, 14TH NOVEMBER, 1896.]

BANQUE D'HOCHELAGA v. MARITIME NEWS CO.

*Partnership—Action against firm—Particulars as to names of partners.*

Summons for an order "that the defendants do forthwith furnish the plaintiffs with a statement in writing, verified by

affidavit, setting forth the names of the persons constituting the members or co-partners of their firm, pursuant to the Rules of the Supreme Court, 1884, Order 16, Rule 14," and for costs.

WEATHERBE, J., at Chambers, granted the order without costs, but striking out the words "pursuant to the Rules of the Supreme Court, 1884, Order 16, Rule 14."

On appeal the Court directed that the order be amended by adding the words "pursuant to the Rules of the Supreme Court, 1884, Order 16, Rule 14;" the costs of the appeal and the costs of the application at Chambers to be costs to the plaintiffs in the cause.

*Cahan*, for the plaintiffs.

*Chisholm*, for the defendants.

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## IN CHAMBERS.

[McDONALD, C.J., 18TH NOVEMBER, 1896.]

### SLOWMWITE v. ARCHIBALD.

*Pleading—Amendment—New trial—Application to add defence.*

The plaintiff was a married woman, carrying on business in her own name, separate from her husband, under the provisions of the Married Women's Property Act.

The action was against the sheriff of Halifax county for conversion of property taken out of the plaintiff's mill under an execution against her husband. The defence was that the property was the husband's. The action was tried and judgment given for the defendant. On appeal a new trial was ordered. The case had been set down for trial on 19th November, 1896. The defendant after this applied, on affidavit of his solicitor, for leave to amend the defence by adding a plea of fraud. The affidavit stated that the solicitor learned for the first time, on consultation with a necessary and material witness for the defendant, that the plaintiff and her husband fraudulently agreed to claim the ownership of the property on behalf of the plaintiff for the purpose of preventing execution and other creditors of the husband from obtaining payment of their just claims against the husband, and that he was not

aware of the evidence enabling him to sustain the proposed pleading until the Saturday before the day on which the application was made.

The application was opposed on the grounds of *laches*; that the proposed defence was not verified; and that there was nothing alleged to induce the Court to suppose that there was any foundation for the allegation of fraud, or that the defendant had any faith in his plea, or that there was any *bona fides*.

The application was refused with costs on all grounds, but the defendant was allowed leave to renew the motion if he could make a stronger case. The case was tried without any further motion.

*F. G. Forbes*, for the motion.

*H. W. C. Boak*, contra.

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[GRAHAM, E.J., 19TH NOVEMBER, 1896.]

### ESSON v. ESSON.

*Parties—Infant—Next friend—Administrator—Party on both sides of record—Stay of proceedings—Amendment.*

This was an action brought by A. E., guardian of an infant, against herself, as administratrix of the estate, and her co-administrator, to recover the amount awarded to the infant by a decree of the Court of Probate. R. E. was co-administrator. Counsel for R. E. applied for a stay of proceedings on the ground that A. E. was both plaintiff and defendant. Counsel for A. E. gave counter-notice to amend, if first application granted. Both motions were heard together.

*Held*, that there was a serious defect in the statement of the action, and that the plaintiff should take one position or the other, either as plaintiff or defendant. That *Byon v. Dickenson*, 27 N. S. Reps. 443, went far enough to permit amendment by substituting the infant suing by her next friend, J. W., as plaintiff, and making necessary amendment in the statement of claim.

*Held*, also, that if defect existed in decree of the Court of Probate, counsel for A. E. might, if so advised, amend and proceed for original cause of action.

R. E., co-administrator, to have costs of application for stay out of the funds.

No costs of application to amend.

*Henry*, for the plaintiff.

*Kenny*, for the defendant co-administrator.

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## NEW BRUNSWICK.

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### In the Supreme Court.

[THE JUSTICES IN BANC, 7TH FEBRUARY, 1896.]

LEA v. WALLACE.

*Married woman—Separate property—Contracts—Coverture.*

The separate property of a married woman, living with her husband, is, under the provisions of C. S. N. B. c. 72, liable in equity by reason of her contracts made during coverture.

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### MCDONALD v. RESTIGOUCHE SALMON CLUB.

*Infant—Deed executed during minority—Repudiation—Reasonable time—Title to land—Ouster.*

The deed of an infant is not void *ab initio*, but voidable on his attaining his majority. If he wishes to avoid it, he must expressly repudiate his contract within a reasonable time after coming of age; otherwise, his silence will be held to amount to an affirmance of it.

*Per* TUCK, HANINGTON, and LANDRY, JJ.; BARKER and VANWART, JJ., dissenting.—The plaintiff is not called upon to prove ouster, when the defendant insists upon his absolute title to the land, and does not raise the question by his statement of defence.

## FOURNIER v. CANADIAN PACIFIC R. W. CO.

*Negligence—Damages caused by sparks from engine—Evidence—Responsibility of railway company.*

The plaintiff alleged that the defendants managed their locomotive so negligently and unskilfully that sparks escaped therefrom and set fire to the plaintiff's barns and buildings, whereby he was injured. For proof of negligence the plaintiff relied on the fact that there was a heavy up-grade on the track in close proximity to the buildings destroyed; and that a good engine, properly protected, would not throw sparks a distance of thirty-four feet.

*Held*, not sufficient evidence of negligence to warrant a verdict for the plaintiff.

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HAINES v. DUNLAP.

*New trial—Nominal damages—Assault—False arrest and imprisonment.*

The Court will not grant a new trial to enable a plaintiff to recover only nominal damages.

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HOVEY v. LONG.

*Evidence—Title to land—Recital in deed—Testimony taken in former action—Admissibility—Conditions.*

The recital in a deed is no evidence of title; therefore, where a man says in a deed that he is an heir, it is not evidence of heirship to submit to a jury.

Where a witness has given testimony under oath in a judicial proceeding, in which the adverse litigant has the power to cross-examine, the testimony so given will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties, or those claiming under them; provided it relates to the same subject, or substantially involves the same material questions.



[12TH DECEMBER, 1896.]

*In re* RESTIGOUCHE DOMINION ELECTION.

## ALEXANDER v. McALLISTER.

*Parliamentary elections—Petition—Preliminary objections—Copy for petitioner—Failure to file—Irregularity—Waiver—Amendment—Affidavit of petitioner—Grounds of belief—Corrupt practices by petitioner—Affidavit not read over to petitioner—False affidavit—Abuse of process of Court.*

Upon preliminary objections to an election petition under the Dominion Controverted Elections Act :—

*Held, per* TUCK, C.J., HANINGTON, LANDRY, and McLEOD, JJ., that the failure to file for the petitioner a copy of the preliminary objections to the petition, as required by R. S. C. c. 9, s. 12, and by the New Brunswick General Rules of the Election Court, Easter Term, 1887, s. XII., was waived by the taking of subsequent proceedings before raising the question ; but, in any case, it was only an irregularity that could be amended ; and the respondent was allowed to file such copy *nunc pro tunc*.

2. That the affidavit of the petitioner was sufficient, notwithstanding that it did not set out his reasons for his belief of the facts sworn to therein.

8. That the fact that the petitioner himself had been guilty of corrupt practices did not preclude him from being a petitioner.

4. That the petitioner's affidavit, not having been read over by him or to him, and he not being acquainted with its contents, was in fact no affidavit. Also, that, as the alleged affidavit was false and untrue, it was an abuse of the process of the Court ; and the petition was dismissed.

BARKER, E.J., agreed in the result.

VAN WART, J., dissented.

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## IN CHAMBERS.

[TUCK, C.J., 1ST DECEMBER, 1896.]

## LANDRY v. LEGERE.

• *Ejectment—Residence—Notice.*

In an action of ejectment, the attorney issuing the writ did not indorse thereon his place of abode, nor attach a notice of the nature of the title to be set up by the plaintiff.

*Held*, that the writ was not in compliance with ss. 4 and 5 of the Ejectment Act, 57 V. c. 10.

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[McLEOD, J., 20TH NOVEMBER, 1896.]

*Ex parte* QUIRK.*Habeas corpus—Voluntary imprisonment.*

The prisoner, Annie T. Quirk, lived with her mother in Studholm, King's County, New Brunswick. On the 17th of November a constable went to her mother's residence to arrest the mother on a conviction for violating the Canada Temperance Act; she advised her mother to go to gaol, whereupon both went upstairs, the mother, presumably, to get ready to go with the constable, and she to go to Sussex. In a short time she returned wearing a close mourning bonnet and a heavy black veil over her face; the constable, supposing her to be the mother, directed her to get into his carriage; and, without exchanging a word or lifting her veil, she accompanied the constable to gaol, the gaoler locking her up.

*Held*, that, notwithstanding she had artfully and designedly contrived her own arrest and imprisonment, in order to shield her mother against arrest and imprisonment, she must forthwith be discharged from custody. The order was made exempting the sheriff and gaoler from liability.

*A. W. MacRae* and *F. L. Fairweather*, for the prisoner.

*G. O. Dickson-Otty*, for the inspector.

[28<sup>RD</sup> NOVEMBER, 1896.]

## DOCKRILL v. RUSSELL.

*Landlord and tenant—Surrender—Review.*

The plaintiff let a shop to the defendant, the tenancy being from year to year, at a rental of \$300. During the month of February there was a conversation between them about the defendant surrendering the premises on the first day of the following May, but no notice to quit in writing was served by either party. In March the plaintiff agreed to advertise the premises at the expense of the defendant, and accordingly offered to let the same, but could not obtain a tenant. On the first day of May the defendant moved out, leaving the key with the plaintiff, who refused to accept a surrender. In July the premises were used by somebody in connection with the Opera House, in the same building; yet, it did not appear who gave the authority to use them.

*Held*, affirming the judgment of the Court below (and citing *Phene v. Popplewell*, 12 C. B. N. S. 384, and *Oastler v. Henderson*, 2 Q. B. D. 575), that there had been no possession of the premises by the plaintiff so inconsistent with the defendant's term as to amount to a surrender by operation of law.

*Held*, also, that the objection to the affidavit and order being entitled, "In the Supreme Court, on review from the City Court of the city of Saint John," instead of "On review from the City Court of Saint John," was untenable.

*T. P. Regan*, for the plaintiff.

*C. A. Palmer*, Q.C., for the defendant.

[27<sup>TH</sup> NOVEMBER, 1896.]

## MOREN v. EQUITABLE MARINE INS. CO.

*Appearance without authority—Leave to withdraw.*

The plaintiff served a Supreme Court writ on the agents of the defendant company, a foreign corporation doing business in New Brunswick; M., an attorney, without instructions, entered

an appearance ; and the plaintiff filed a declaration. After the declaration was filed M. notified the plaintiff's attorney that he had entered the appearance without instructions, and wished to withdraw it ; the plaintiff's attorney would not consent to its withdrawal.

M. applied for leave to withdraw his appearance ; leave was granted.

The plaintiff applied for leave to examine under oath the agents of the defendant company as to whether they gave M. instructions to appear ; leave was refused.

*C. A. Palmer, Q.C., for the plaintiff.*

*H. H. McLean, for the defendants.*

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[1ST DECEMBER, 1896.]

*Ex parte McEACHERN.*

*Habeas corpus—Canada Temperance Act—Dismissal—Conviction.*

On the 9th November, 1896, the prisoner, Charles McEachern, was convicted for violating the Canada Temperance Act in Northumberland county, New Brunswick, it being a second offence, and a fine of \$100 was imposed. The prisoner was sent to gaol. The information was for selling between 22nd July and 22nd October, but on the hearing it was amended to make it read, between the 31st July and the 22nd October. Previous to this information, another information had been laid before the same Parish Court Commissioner for selling between the 29th July and the 29th September, it being also a second offence, and the complaint was dismissed on the hearing, and the prisoner received a certificate of dismissal. On the last hearing (the hearing upon which he was convicted) two new witnesses were called who did not give evidence on the previous hearing, and who testified to sales not given in evidence on the previous hearing.

*Held*, that, as it did not appear that the sales for which the prisoner was convicted were made between the times covered by the certificate of dismissal, no relief could be granted under a *habeas corpus*.

2. That a Judge may go behind the return of a *habeas corpus*, and inquire into the facts leading to the imprisonment.

*John L. Carleton*, for the prisoner.

*L. A. Currey*, Q.C., and *A. W. Baird*, for the inspector.

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## In the County Court.

### IN CHAMBERS.

[FORBES, J.C.C., 4TH DECEMBER, 1896.]

FRATTER v. ANDREWS.

*Ship—Disrating seaman—Wages.*

The plaintiff shipped on the *Robert S. Besnard* as an A.B.; during the voyage it appeared that he could not perform the duties of an A.B., and was accordingly disrated.

*Held*, that the disrating was not retroactive; that the plaintiff was entitled to the wages of an A.B. from the time he shipped to the time he was disrated.

*H. A. McKeown*, for the plaintiff.

*C. A. Palmer*, Q.C., for the defendant.

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## MANITOBA.

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### In the Queen's Bench.

[FULL COURT, 2ND DECEMBER, 1896.]

MASSEY-HARRIS CO. v. McLAREN.

*County Court appeal—Right of appeal—Amount in question—Jurisdiction.*

Appeal from a County Court. The plaintiffs sued to recover the sum of \$55.43. Except as to \$1 the claim was practically undisputed, but the defendant set up a counterclaim for breach of warranty, and was allowed an amount which

reduced the plaintiffs' claim to \$39.10, for which the plaintiffs obtained judgment. The defendant entered an appeal to the full Court to have the damages allowed upon his counterclaim increased; but, when the appeal came on for argument, it was objected that less than \$50 was in question, and that there was no jurisdiction in the Court to hear the same.

By the section substituted for s. 315 of the County Courts Act, R. S. M. c. 88, by 59 V. c. 3, s. 2, it is provided, "In case any person directly affected by any order, decision, or judgment of a Judge . . . in any action, suit, matter, or proceeding in any County Court, in which the amount in question . . . is \$80 or more, is dissatisfied with such order, decision, or judgment of a Judge . . . he shall be entitled to an appeal to a Judge of the Court of Queen's Bench, where the amount in question . . . does not exceed the sum of \$50, and to the Court of Queen's Bench *in banc* when the amount in question . . . exceeds the sum of \$50."

*Held*, that the appeal must be struck out with costs. The amount adjudged against the defendant was only \$39.10, and he sought by his appeal only to relieve himself from that amount by a further deduction, and it was that amount only that he could claim to be in question. His appeal should have been to a single Judge, and not to the Court *in banc*.

*Allan v. Pratt*, 18 App. Cas. 780; *Monette v. Lefebvre*, 16 S. C. R. 387, referred to.

*W. A. Macdonald*, Q.C., for the plaintiffs.

*A. D. Cameron*, for the defendant.

[A cross-appeal had also been entered by the plaintiff; on delivery of the above judgment counsel asked leave to withdraw it, and it was struck out with costs.]

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## Supreme Court of Canada.

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EXCHEQUER COURT.]

[9TH DECEMBER, 1896.]

### THE "CUBA" v. McMILLAN.

*Maritime law—Collision—Rules of the road—R. S. C. c. 79, s. 2, Arts. 15, 16, 18, 19, 21, 22, 23—Compliance with signal—Negligence.*

The steamship "Elliott," from Charlottetown to Sydney, C.B., arrived off Law Point in Sydney Harbour about 7.30 p.m., and stopped for a pilot, who came aboard and headed her up channel at full speed on a course towards the northerly side, her proper course in a narrow channel. After proceeding a while, the masthead light of a vessel was seen over the south-east bar moving in a northerly direction across the mouth of the harbour, Presently both side lights became visible also, and all three were seen for about ten minutes, a point or a point and a half on the port bow. This vessel was the "Cuba," outward bound, and she saw the "Elliott's" red light about two miles off, a point or a point and a half on her starboard bow. Each vessel soon made out the other's course.

The "Elliott," seeing that the "Cuba" kept her bearings for some time, with both side lights always visible, further ported her helm, and the "Cuba" went further to starboard. When they were about a quarter of a mile apart, the "Elliott's" helm was put hard to port, and the "Cuba" turned sharply to port, shutting out her red light. When about two cable lengths away the "Cuba" signalled by two blasts of her whistle that she was going to port. The "Elliott" then reversed her engines, but perceiving almost immediately that the bow of the "Cuba" was turned to starboard, instead of to port, set them going again at full speed, hoping to cross clear of the "Cuba's" bow. The vessels were, however, too close together, and the "Cuba's" bow struck the "Elliott" a little abaft amidships.

*Held*, that from the evidence and finding of the local Judge in Admiralty, Nova Scotia District, 5 Ex. C. R. 185, the vessels

were not end on or "meeting" ships or "crossing" ships, with the lights red to green or green to red, but they were "passing" ships, one side light of the "Elliott" being seen dead ahead of the "Cuba." In such case there is no statutory rule imposed, as, unless the course is changed, the vessels must go clear of each other; it is governed by the rules of good seamanship. The "Elliott," therefore, violated no statutory rule in porting her helm, and acted consistently with good seamanship.

*Held*, further, that the "Cuba" was in fault in persisting, without good reason, in keeping on the wrong side of the fairway; in starboarding her helm when it was seen that the "Elliott's" was hard to port, with the vessels rapidly approaching; and, after signalling that she was going to port, in reversing her engines, whereby her head was turned to starboard.

*Held*, also, that, though the "Elliott" may have violated the statutory rule requiring her to slacken speed or stop and reverse, if necessary, when approaching another vessel so as to involve risk of collision, yet, as the omission to do so would have led to no injurious consequences if the "Cuba" had acted in conformity with her signal, she was not, for that reason, responsible for the accident: R. S. C. c. 79, s. 5.

The rule as to steam vessels keeping to their starboard side of a narrow channel does not override the general rule of navigation.

*The "Leverington,"* 11 P. D. 117, followed.

Judgment of the Court below affirmed.

*Mellish*, for the appellant.

*Harris*, Q.C., for the respondents.

ONTARIO.]

## SALES v. LAKE ERIE & DETROIT RIVER R. W. CO.

*Railway company—Carriage of goods—Connecting lines—Special contract—Loss by fire in warehouse—Negligence—Pleading.*

In an action by a merchant at Merlin, Ontario, against a railway company, the statement of claim alleged that the plaintiff had purchased goods from persons in Toronto and elsewhere,



to be delivered to the Grand Trunk Railway Company, the Canadian Pacific Railway Company, and other companies, and to be transferred by the several companies to the defendants for carriage to Merlin, and that the goods were delivered and transferred accordingly. It also alleged that on receipt by the defendants of the goods, it became their duty to carry them safely to Merlin and deliver them to the plaintiff, but did not allege that they were received to be carried subject to the common law liability of the defendants as common carriers. There was also an allegation of a contract by the defendants for storage of the goods and delivery to the plaintiff, when requested, and of lack of proper care, whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the defendants at Merlin.

*Held*, reversing the decision of the Court of Appeal, 17 P. R. 224, 16 Occ. N. 315, that as to the goods delivered to the Grand Trunk Railway Company to be transferred to the defendants as alleged, if the cause of action stated was one arising *ex delicto*, it must fail, as the evidence showed that the goods were received from the Grand Trunk Railway Company for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the Grand Trunk Railway Company to the consignors, and if it was a cause of action founded on contract, it must also fail, as the contract proved created only a limited liability and was not the absolute unconditional contract set up in the statement of claim.

*Held*, further, that as to the goods delivered to the companies other than the Grand Trunk Railway Company to be transferred to the defendants, the latter were liable under the contract for storage alleged; that the goods were in their possession as warehousemen, and the bills of lading contained no clause, as did those of the Grand Trunk Railway Company, giving subsequent carriers the benefit of their provisions; and that, as the two courts below had held that the loss was caused by the negligence of servants of the defendants, such finding should not be interfered with.

*Held*, also, that as to goods carried on a bill of lading issued by the defendants, there was an express provision therein that owners should incur all risk of loss of goods in charge of the defendants, as warehousemen; and that such condition was a

reasonable one, as the defendants only undertook to warehouse goods of necessity and for convenience of shippers.

The appeal was therefore allowed in part.

*W. R. Riddell*, for the appellants.

*D. E. Thomson*, Q.C., and *W. N. Tilley*, for the respondent.

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*In re* CANADIAN PACIFIC R. W. CO. AND CITY OF  
TORONTO.

*Municipal corporations—By-law—Assessment—Local improvements—Railway company—Joint special agreement—Agreement with owners of property—Construction of subway—Benefit to lands.*

An agreement was entered into by the corporation of the city of Toronto with a railway company and other property owners for the construction of a subway under the tracks of the company ordered by the Railway Committee of the Privy Council, the cost to be apportioned between the parties to the agreement. In connection with the agreement, a roadway had to be made, a part of which fronted on the company's lands, and which, when made, cut off to some extent the lands from abutting as before on certain streets, and a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injuries to its lands by construction of the works. The city passed a by-law assessing on the company their portion of the cost of the roadway as a local improvement.

*Held*, that, to the extent to which the lands of the company were cut off from abutting on the streets as before, the work was an injury and not a benefit to such lands, and, therefore, not within the clauses of the Municipal Act as to local improvements; that, as to the length of the retaining wall, the work was necessary for the construction of the subway, and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement.

*Held*, further, that as the by-law had to be quashed as to three-fourths of the work affected, it could not be maintained as to the

residue which might have been assessable as a local improvement, if it had not been coupled with work not so assessable.

Notice to a property owner of assessment for local improvements under s. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the Court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act.

In the result, the judgment of the Court of Appeal, 28 A. R. 250, 16 Occ. N. 215, was affirmed.

*Robinson, Q.C., and Caswell, for the appellants.*

*E. D. Armour, Q.C., and Angus MacMurchy, for the respondents.*

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QUEBEC.]

### SENEBAC v. VERMONT CENTRAL R. W. CO.

*Appeal—Finding of Court below—Absence of proof—Interference with on appeal—Railway company—Negligence.*

An action was brought by S. against a railway company for damages from loss of property by fire from a woodshed on the company's premises, spreading to the adjoining property of S. The Superior Court and the Court of Review both held that the origin of the fire was a mystery, and that it was not proved to have been caused by any fault of the company. On appeal from the decision of the Court of Review, Q. R. 9 S. C. 819 :—

*Held*, that, as there was nothing to show that the judgment appealed from was clearly wrong or erroneous, the Supreme Court would not interfere with it.

*Geoffrion, Q.C., for the appellant.*

*Greenshields, Q.C., and Lafleur, for the respondents.*

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### MONTREAL ROLLING MILLS CO. v. CORCORAN.

*Master and servant—Negligence—Cause of accident—Evidence—Presumptions—Art. 1053, C. C.—Quebec Factories Act, R. S. Q. Arts. 3019-3053—Police regulations—Civil responsibility.*

An engineer, in charge of the engine and machinery of a

rolling mills company, was killed by being caught in a belt or a fly wheel while acting in discharge of his duty. He was alone at the time, and no certain evidence could be obtained as to the immediate cause of the accident. In an action by his widow against the company for damages for his death, it was contended that the fact that the fly wheel and machinery were not securely guarded or fenced, contrary to the provisions of the Quebec Factories Act, R. S. Q. Arts. 8019-8058, was sufficient evidence of negligence to make the employers of the deceased liable.

*Held*, reversing the judgment of the Court of Queen's Bench, that it was necessary to prove by direct evidence, or by precise and consistent presumptions, that the accident was caused by the positive fault, imprudence, or neglect of the employers; and, in the absence of such proof, they were not liable.

*Held*, further, that the above provisions of the Factories Act were intended to operate purely as police regulations, and did not affect the civil responsibility of employers towards employees, as provided by the Civil Code.

*McGibbon and Riddell*, for the appellants.

*Guerin*, for the respondent.

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### LEFEBVRE v. AUBRY.

*Partnership—Dissolution—Distribution of assets—Mandatory—Accounts—Action.*

On the dissolution of a non-commercial partnership in the Province of Quebec, where, for want of other arrangement between the partners, the assets must be divided by operation of law, such division must follow the rules regulating the partition of successions: Art. 1898, C. C.

Where one partner, on dissolution of the partnership, has been intrusted, as mandatory of the others, with the collection of debts due, any of his former co-partners can bring an action against him directly either for an account or for money received and not paid over.

Judgment of Court below affirmed.

*Geoffrion*, Q.C., and *Martineau*, for the appellant.

*Lafleur* and *Bonin*, for the respondent.

NOVA SCOTIA.]

*In re* McLELLAN—McLAUGHLIN v. McLELLAN.

*Will—Execution of—Testamentary capacity—Mental condition of testator.*

In proceedings before a Court of Probate to prove a will in solemn form, evidence was offered to show that the testator, when he gave instructions for the preparation of the will and when he executed it, was not possessed of testamentary capacity.

*Held*, affirming the decision of the Supreme Court of Nova Scotia, 28 N. S. Reps. 226, that, although the testator suffered from a disease that induced drowsiness or stupor, and when he gave the instructions and executed the will was in a drowsy condition, and there was difficulty in keeping his mind in a state of activity so as to ascertain what his wishes were, yet, as it appeared that he understood and appreciated the instructions he gave and the document itself when read over to him, it was a valid will.

*Mellish*, for the appellant.

*Laurence*, for the respondents.

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## ONTARIO.

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Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 4TH JANUARY, 1897.]

JOHNSTON v. TOWN OF PETROLIA.

*Appeal—Court of Appeal—Cross-appeal—Notice—Rule 825—Time—Signing of judgment—Rule 804—Extension of time.*

In an action brought against three defendants for damages for pollution of a stream, judgment was given at the trial for the plaintiff against one defendant, and the action was dismissed against the other two.

*Held*, that upon the appeal of the first defendant to the Court of Appeal, the plaintiff, the respondent, could not maintain a cross-appeal against the other defendants by way of notice under Rule 825, but must proceed by way of an independent appeal.

*Freed v. Orr*, 6 A. R. 690, not followed.

*Re Cavenders' Trusts*, 16 Ch. D. 270, followed.

Under Rule 804 the time for service of notice of appeal runs from the day on which the judgment appealed against is actually signed or entered, and not from the day upon which it is pronounced.

Time for giving notice of appeal extended where the party proposing to appeal had from the first shown his intention to appeal, but had been under a misapprehension as to the practice, and no session of the Court had been lost.

*W. R. Riddell*, for the plaintiff.

*McCarthy*, Q.C., for the defendants Fairbanks, Rogers, & Co.

*W. Cassels*, Q.C., for the defendants the Imperial Oil Co.

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## HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., MEREDITH, J., 17TH DECEMBER, 1896.]

### ROSE v. VILLAGE OF MORRISBURG.

*Ditches and water courses—Completion of work by engineer—Time for engineer to take action.*

By s. 28 of 57 V. c. 55, the Ditches and Water Courses Act, it is provided that "the engineer, at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same, if required in writing so to do by any of the owners interested, . . . and may let the work . . . to the lowest bidder," etc.

*Held*, MEREDITH, J., dissenting, that, on its proper construction, this means that if a proprietor of the land through which the ditch goes fails to complete his portion of it within the time limited, then it is open for those interested to bring on the engineer in order to have the whole work properly completed; and the lapse of a year, or even two years, as in this case, is not

fatal where it is plainly made to appear that the drain was not made, within the time or after the time, of the proper dimensions, by the one who had the first option to do the work.

*A. H. Marsh, Q.C., for the plaintiff.*

*Adam Johnston, for the defendants.*

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MACGILLIVRAY v. MIMICO REAL ESTATE  
SECURITY CO.

*Covenant against incumbrances—Sale of land—Breach—Measure of damages.*

Action for damages for breach of covenant against incumbrances. The mortgage wherein consisted the breach was on the lands in question and other lands, and was for an amount much greater than the present value of the land. It was impossible to apportion it so as to ascertain the incidence of the burden on the plaintiff's land.

*Held, MEREDITH, J., dissenting, that the measure of damages was the whole amount due on the mortgage; but judgment should be for payment of the amount into Court, so that, if paid, it might reach its proper destination.*

*Per MEREDITH, J.—Judgment should be simply for a reference to ascertain what, if anything, the plaintiff was entitled to recover for breach of the covenant sued on, reserving further directions and costs.*

*C. D. Scott, for the plaintiff.*

No one appeared for the defendants.

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[MEREDITH, C.J., ROSE, J., MACMAHON, J., 18TH JANUARY, 1897.]

REGINA v. McFARLANE.

*Summary conviction—Municipal by-law—Regulation of hawkers—Municipal Act, s. 495—Negating exception—Amendment—Criminal Code, ss. 889, 890—Costs.*

Rule to quash a summary conviction of the defendant by two justices of the peace for the county of Halton, for alleged breach of a by-law of the county regulating hawkers and peddlers, by selling fresh meat without a license. The by-law was passed pursuant to s. 495 of the Municipal Act.

The Court *held*, that the conviction was bad upon its face, because it did not negative the exception in s. 495, s.-s. 8, with regard to "hawking or peddling any goods, wares, or merchandise, the growth, produce, or manufacture of this province;" and that it could not be amended under ss. 889 and 890 of the Criminal Code, because the evidence, when looked at, did not show an offence against the by-law; and as to costs, that, as the prosecutor was not discharging a public duty, there was no reason why he should not be ordered to pay costs.

Rule absolute quashing conviction with costs to be paid by the private prosecutor.

*J. W. Nesbitt*, Q.C., for the defendant.

*McBrayne*, for the private prosecutor.

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[ROSE, J., 18th NOVEMBER, 1896.]

### JOHNSON v. DOMINION EXPRESS CO.

*Common carriers—Express company—Profession of carrying—Discrimination in customers—Charges.*

An express company is not bound to carry except according to its profession, is entitled to discriminate as to its customers, and is not confined by any rule or regulation as to the charges it may make, provided they are reasonable; and an action to compel such a company to carry goods tendered was dismissed with costs.

*McCarthy*, Q.C., and *L. G. McCarthy*, for the plaintiffs.

*Robinson*, Q.C., *S. H. Blake*, Q.C., and *Angus MacMurchy*, for the defendants.

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### IN CHAMBERS.

[FERGUSON, J., 13th JANUARY, 1897.]

### HENDERSON v. CANADA ATLANTIC R. W. CO.

*Discovery—Examination of officer of railway company—Flagman.*

A flagman in the employment of a railway company whose duty it is to give notice of danger to persons intending to cross



a line of railway at a particular place, he being under the superintendence of the yard foreman, is not an officer of the company examinable for discovery at the instance of the plaintiff in an action against the company to recover damages for injuries sustained through the alleged neglect of the flagman to give notice of danger.

*R. McKay*, for the plaintiff.

*D. L. McCarthy*, for the defendants.

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## NEW BRUNSWICK

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In the Supreme Court.

IN EQUITY.

[BARKER, J., 19TH DECEMBER, 1896.]

MOREHOUSE v. BAILEY.

*Injunction—Ex parte order—Undertaking as to damages—Enforcement—Dismissal of bill.*

Where a plaintiff obtained an *ex parte* injunction on the usual undertaking as to damages, and the injunction was afterwards dissolved, he was allowed to have his bill dismissed without payment of the damages payable under the undertaking. The undertaking is distinct from the suit, and may be enforced though the bill has been dismissed.

*Wilson*, for the plaintiff.

*Bliss*, for the defendant.

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IN CHAMBERS.

[TUCK, C.J., 29TH DECEMBER, 1896.]

HANSON v. LEGERE.

*Summons—Service—Appearance—Preliminary objection.*

On review from the Parish of Lancaster Civil Court :—

*Held*, (1) that under C. S. N. B. c. 60, s. 9, the service of a summons must be at least six clear days before the return day; (2) that service of a summons on the 26th November, returnable on the 2nd December, is an insufficient service under the statute; and (3) that a defendant may appear on the day of trial to take a preliminary objection without appearing to defend the suit.

*E. R. Chapman*, for the plaintiff.

*John F. Ashe*, for the defendant.

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### STARKIE v. CANADIAN PACIFIC R. W. CO.

*Pleading—Amendment—Costs.*

The defendants applied, after notice of trial and within a few days of the opening of the Court, in a suit which had been pending for more than two years, and to which they had already pleaded the general issue, for leave to amend by adding new pleas. Leave was granted upon payment of costs.

*J. D. Hazen*, Q.C., for the plaintiff.

*Allen O. Earle*, Q.C., for the defendants.

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### In the County Court.

#### IN CHAMBERS.

[FORBES, J.C.C., 18TH DECEMBER, 1896.]

### BELYEA v. MCGINNIS.

*Judgment debtor—Examination of—59 V. c. 28, s. 36—Scope of—Actions ex contractu and ex delicto.*

*Held*, (1) that 59 V. c. 28, s. 36, applies to judgments in actions both *ex contractu* and *ex delicto*; and (2) that the principle in *Beste v. Berastain*, 20 N. B. Reps. 106, does not extend to an examination of a judgment debtor under 59 V. c. 28, s. 36.

*A. W. MacRae*, for the plaintiff.

*J. B. M. Baxter*, for the defendant.

[23RD DECEMBER, 1896.]

## KEITH v. COATES.

*County Court—Jurisdiction—Secondary evidence—Bail—Interest.*

On review from the Parish of Salisbury Civil Court :—

*Held*, (1) that 58 V. c. 21 gives any Judge of any County Court in the Province jurisdiction to hear a matter on review from any parish or county in the Province; (2) that, before secondary evidence can be given of the contents of a paper, it must first be shown that every reasonable effort has been made to obtain it, or that it is absolutely lost; and (3), following *Byron v. Flagg*, 18 N. B. Reps. 896, that in an action against bail, interest on the judgment against the principal in the first suit cannot be included in the judgment against the bail.

*W. B. Chandler*, for the plaintiff.*A. A. Stockton*, Q.C., for the defendant.

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 MANITOBA.
 

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## In the Queen's Bench.

[FULL COURT, 23RD DECEMBER, 1896.]

## CROTHERS v. MONTEITH.

*Liquor License Act—R. S. M. c. 90, s. 35—Vagueness of section—Application to cancel license—Power implied—Construction of statutes.*

Appeal from decision of BAIN, J., 16 Occ. N. 862.

*Held*, that the appeal should be dismissed with costs.

The wording of the Liquor License Act may raise difficulties, but it is the duty of a Judge to give such a construction to the Act as shall suppress the mischief and advance the remedy, and the widest operation is therefore to be given to the enactment so long as it does not go beyond its real object and scope: *Heydon's Case*, 8 Rep. 7.

Subject to the provisions of the statute, the granting or withholding of licenses rests with the commissioners, and when the

Act says a petition may be presented, it is necessarily implied that it is to them that it must be presented.

In *Re Thomas*, 26 O. R. 448, it was held that there could not be a writ of prohibition to prevent license commissioners from granting a license, and if so, there cannot be a prohibition to prevent them from cancelling one.

*Wade*, for the plaintiff.

*Maclean*, for the defendants.

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### REGINA v. DOUGLAS.

*Criminal law—Evidence—Canada Evidence Act, 1893, s. 5—Evidence in civil suit—Admissibility of, on criminal charge—Identity of prisoner with deponent.*

Reserved case. At the Autumn Assizes, 1896, the prisoner was tried upon an indictment laid under s. 368 of the Criminal Code, charging him with making an assignment of his property with intent to defraud his creditors. The jury brought in a verdict of guilty, but the Judge reserved a case as to the admissibility of certain evidence, and as to the proof of the identity of the prisoner. At the trial an official stenographer of the Superior Court for the Province of Quebec was called as a witness by the Crown and asked to testify as to a deposition made by the prisoner in a case depending before that Court. Counsel for the prisoner objected to the reception of this evidence, insisting that under the Canada Evidence Act, 56 V. c. 81, s. 5, it was not admissible.

The deposition sought to be given in evidence was made in the progress of a civil action depending in the Superior Court of the Province of Quebec.

When examined as to the identification of the prisoner, the stenographer stated that the prisoner resembled the J. S. Douglas whose deposition he had taken in Montreal, but he would not swear positively that he was the same man, though he had no doubt it was. Counsel for the prisoner objected to the evidence as not sufficiently identifying the prisoner to admit the deposition.

The questions submitted for the opinion of the Court were :—

1. Was the deposition of the prisoner produced by the stenographer admissible in evidence, or should it have been excluded under s. 5 of the Canada Evidence Act?

2. Should the deposition have been excluded, on the ground that it was not sufficiently proven that the J. S. Douglas whose deposition was taken in Montreal was the same man as the prisoner?

*Held*, that the answer to the first question must be that the evidence was properly admitted.

The Canada Evidence Act, by s. 2, applies to all criminal proceedings and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction. The action in Quebec was in a Provincial Court, and was a civil action over the procedure in which the Province of Quebec had jurisdiction.

The answer to the second question should be in the negative. The Judge was right in submitting it to the jury to determine how far the identity was proved to their satisfaction.

Conviction affirmed.

*Howell*, Q.C., and *Metcalf*, for the prisoner.

*Maclean*, for the Crown.

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### *In re* MARQUETTE DOMINION ELECTION.

*Parliamentary elections—Petition—Dominion Controverted Elections Act—Affidavit of petitioner—Alleged insufficiency of—Application to dismiss petition—Powers of Court where process abused.*

Appeal from decision of KILLAM, J., 16 Occ. N. 361.

*Held*, that the appeal should be allowed.

Where an affidavit is required, it must be a true affidavit. The Legislature never required an affidavit to be filed pledging the oath of the deponent to certain facts, leaving it a matter of indifference whether the affidavit so required was true or false.

That a petition has been presented is essential to give the Court jurisdiction to inquire as to the return for an Electoral District. That is the foundation for the Court exercising jurisdiction. The Act has said that when such a petition is presented, there shall be presented with it a certain affidavit. Unless that affidavit is so presented there is properly no petition before the Court.

The Court can inquire as to the truthfulness of an affidavit presented with a petition and whether it has been imposed upon in connection with the presentation of a petition.

It was impossible, after reading the examination of the petitioner, to believe that he had good reason to believe, and verily did believe, the several allegations contained in the petition to be true. The affidavit then was not a true affidavit, not such an one as was required by the Act. A false affidavit is not an affidavit in the true sense of the word. A real affidavit is a statement of certain facts, to the truth of which the person making it has pledged the sanctity of his oath. Swearing to the truthfulness of stated facts cannot be considered merely as a trivial formality.

It was argued that this was a matter which, if the Court could entertain it at all, should have been brought forward, as a preliminary objection, under s. 12 of the Controverted Elections Act, within five days after the service of the petition.

There must be objections, other than those dealt with by s. 12, open to a respondent, and as to these there is no limit upon the time within which they can be urged, other than that they must be so within a reasonable time. It could not be said that a respondent was, by s. 12, precluded from raising objections which he did not and could not know of within the five days, or objections on account of something happening after the time limited.

Holding then that this was an objection open to the respondent, if taken within a reasonable time after attaining a knowledge of it, that the petitioner was shown by his own examination not to have had any good reason to believe the several allegations contained in the petition, and so the affidavit was not such an one as the Act required, that the presenting a petition accompanied by such an affidavit was an abuse of the process of the Court, and that the Court had on account of such an abuse of its process power and jurisdiction to dismiss the petition, the appeal should be allowed with costs, and the petition and all proceedings thereon stayed with costs to be paid by the petitioner.

*Howell, Q.C.*, for the petitioner.

*Tupper, Q.C.*, and *Phippen*, for the respondent.

*In re* MACDONALD DOMINION ELECTION.

*Parliamentary elections—Petition—Dominion Controverted Elections Act—Affidavit of petitioner—Alleged insufficiency of—Application to dismiss petition.*

Appeal from decision of KILLAM, J., 16 Occ. N. 861.

This was a case similar to the *Marquette Case*, *ante*.

*Held*, that the appeal should be dismissed without costs.

The petitioner was examined, and the evidence he gave was far from satisfactory. His knowledge of the charges made in the petition was derived from common rumour, and he did not appear to have investigated the truth of these. But, when in Winnipeg, there were read to him affidavits or statements made by a number of persons as to transactions connected with the election. He stated several stories told him of what, if true, were corrupt practices, giving at the same time the names of his informants. These might have been credible persons, or at all events persons known to him whom he believed to be credible persons, persons upon whose word he believed he could rely. So he might, from what was said by these persons, have had good reason to believe, and verily did believe, that the allegations made were true. Yet the Court should not come to the conclusion that the affidavit was untrue, unless in a case in which the want of any foundation for making the affidavit clearly appeared. To dismiss a petition or stay the proceedings under it on the ground that the affidavit is untrue, it is necessary for the Court to be perfectly satisfied that it is so.

In the present case, while the evidence of the petitioner was by no means satisfactory, the Court would hesitate to go that length. In this case the appeal should be dismissed without costs.

*Howell*, Q.C., for the petitioner.

*Tupper*, Q.C., and *Colin H. Campbell*, Q.C., for the respondent.

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[BAIN, J., 28TH DECEMBER, 1896.]

*In re* HALLSWORTH AND ZIEKRICK.

*Liquor License Act—R. S. M. c. 90—Prosecution—Conviction quashed—Fresh summons on same information—Prohibition refused.*

This was a motion for a writ of prohibition directed to one

Samuel Jones, a justice of the peace, to prohibit him from further proceeding on an information laid before him on the 1st June, 1896, by Hallsworth, charging that Minnie Ziekrick unlawfully had liquor at Ninga for the purpose of sale without the license required therefor.

It appeared that a summons was issued on this information commanding the defendant to appear before the justice on the 4th June following to answer to the charge; that the justice who issued the summons and another magistrate held a court at the time and place mentioned in the summons; and that Mr. Buckingham, an attorney, appeared for Ziekrick and pleaded guilty for her to the charge laid, whereupon the magistrates convicted her of the offence charged and find her \$89.50 and \$10.50 for costs, with imprisonment for two months in default of payment. Mr. Buckingham paid a portion of the fine at the time, but afterwards the defendant obtained a rule *nisi* to quash the conviction on the ground that Mr. Buckingham had appeared at the trial and entered a plea of guilty without her authority or knowledge. On the motion to make the rule absolute it appeared that the summons had not been served on the defendant personally, and that she had not herself instructed Mr. Buckingham to appear for her, and, as there was some doubt as to whether she had authorized the instructions to Mr. Buckingham, an order was made quashing the conviction.

Then, after the conviction had been quashed, a summons was issued by Jones, on the same information on which the first summons had been issued, summoning the defendant to appear and answer the charge on the 4th November, 1896.

Section 174 of the Liquor License Act provides that all informations and complaints for prosecutions for offences under the Act shall be made within thirty days after the commission of the offence; and the summons in this case had been issued on the original information to save the operation of this section.

*Held*, that the rule must be discharged with costs. There had been no trial or adjudication of the charge on the merits, and until the charge laid in the information had become *res judicata*, it could not be considered that the information had been spent. The information was laid within thirty days after the commission



of the alleged offence, and there had been no delay in carrying on the prosecution, except what had been caused by the defendant herself.

*Wade*, for the applicant.

*Maclean*, for the justice.

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[BAIN, J., 81ST DECEMBER, 1896.]

*In re* BY-LAW 1176 OF THE CITY OF WINNIPEG.

*Municipal corporations—By-law—Application to quash—Illegality—Unreasonableness—Powers given by Act exceeded.*

Motion to quash a by-law passed by the council of the city of Winnipeg for the licensing, inspecting, and regulating of dairies and vendors of milk.

The authority of the council to pass a by-law dealing with such matters was derived from the Municipal Act, R. S. M. c. 100, s. 599, as amended by 57 V. c. 20, s. 17; 58 & 59 V. c. 32, s. 16; and 59 V. c. 15, s. 16.

*Held*, that the by-law was in some matters unreasonable, and in others exceeded the powers given by the Act, and should be quashed with costs.

As the by-law interfered with the right of citizens to employ themselves in a lawful trade or calling, it must be construed strictly.

The Act gave power to pass by-laws for licensing, inspecting, and regulating vendors of milk, and for licensing, inspecting, and regulating dairies and stables, and for preventing the sale or use of milk or other food products until compliance with regulations. The by-law dealt also with the delivery of milk, and was so worded that even mere carriers of milk from points outside the city must procure a license as vendors of milk, or otherwise they would be subject to the penalties imposed by the by-law.

It did not appear that the council had any power to so legislate.

The by-law further provided for an inspection of dairies, and a report as to whether the regulations had been complied with ; if they had, the applicant should receive a license. But a license was to be issued only if the market, license, and health committee gave no contrary order to the health officer. Apparently the committee might arbitrarily deny a license, even if there was a report that all the regulations had been complied with.

Further, while the by-law provided that in no case where the regulations had not been complied with should the health officer issue a license, there was also a provision that the council might override all that and direct a license to issue. That opened a wide door to favouritism and made the by-law unequal in its provisions.

Then the by-law imposed a special tax, for it charged so much for a license and then a further fee of fifty cents for every cow. By s. 838 of the Municipal Act the council might fix the sum to be paid for a license for exercising any trade or calling, and by s. 834 might direct a fee to be paid to the proper officer for a certificate of compliance with any regulations in regard to such trade or calling, but by the latter section such fee was to be "not exceeding one dollar."

The inspector might inspect any cows or cattle in the city whether the owner was or was not selling milk of these cows, and he might collect from the owner a fee of fifty cents a head for each inspection.

There was nothing in the Act to warrant this.

*Martin and Mathers*, for the applicants.

*I. Campbell*, Q.C., for the city of Winnipeg.

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## NORTH-WEST TERRITORIES.

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In the Supreme Court.SOUTHERN ALBERTA JUDICIAL  
DISTRICT.•  
IN CHAMBERS.

[SCOTT, J., 29TH DECEMBER, 1896.]

PATTON v. ALBERTA RAILWAY AND COAL CO.

*Sheriff—Poundage—Reducing amount.*

An appeal by the defendants from the taxation by the Clerk of the Court of a sheriff's bill of charges upon a writ of *fi. fa.* against the defendants' goods placed in his hands for execution, which directed him to levy \$4,000, the amount of the plaintiff's judgment.

Under the execution the sheriff seized a locomotive engine of the defendants, and advertised it for sale. Before the sale took place, further proceedings under the execution were stayed by an order of the Court pending the hearing of an appeal by the defendants against the plaintiff's judgment. By the terms of the order staying proceedings, the defendants were required to pay the sheriff's costs and charges under the execution.

The only item complained of by the defendants was the sum of \$85 allowed to the sheriff for poundage.

The clerk, upon the evidence adduced before him, fixed, the value of the engine at \$8,000, and allowed the sheriff poundage on the same.

*Held*, that the clerk was in duty bound to do so under the provisions of s. 856 of c. 1 of the Revised Ordinances, as no order had been obtained by the defendant under that section reducing the amount of such poundage.

It was contended on behalf of the sheriff that an order under s. 356 reducing the amount of poundage could not be made on this appeal; that the defendants should have proceeded under s. 358 by making an application to a Judge for such an order, and not having so proceeded before the taxation, and having proceeded with the taxation and the appeal therefrom in the ordinary way, they had waived their right to apply for a reduction.

*Held*, that this contention could not be upheld. The discretion conferred on a Judge by s. 356 might be exercised by him upon an appeal from taxation as well as upon an application under s. 358, which action merely provides a means by which an execution debtor may obtain such an order without incurring the expense of a taxation and an appeal therefrom.

Definition of "poundage" from Wharton's Law Lexicon, cited.

In England the Court has power to direct that the sheriff shall receive poundage in certain cases where he would not otherwise be entitled to it.

*In re Perkins' Beach Lead Mine Co.*, 7 Ch. D. 371, referred to.

In the present case nothing was realized under the execution, but s. 356 enacts that the sheriff shall be entitled to claim poundage notwithstanding that fact, subject to the proviso that a Judge may reduce the amount to such sum as he may deem reasonable under the circumstances.

*Wadsworth v. Bell*, 8 P. R. 478, considered.

In the present case no money had been realized upon the execution, and it was possible that the defendants' appeal might be dismissed, and that the sheriff might again seize and sell their goods under execution in this suit, and might claim full poundage upon the amount realized.

*Held*, that the circumstances were such that some reduction should be made in the sheriff's charge for poundage, and it would be reasonable to reduce the amount from \$85 to \$40.

Order accordingly. No costs of appeal.

## ONTARIO.

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### Supreme Court of Judicature.

### COURT OF APPEAL.

DIVISIONAL COURT.]

[12TH JANUARY, 1897.]

#### YOUNG v. WARD.

*Husband and wife—Employment or occupation in which husband has no proprietary interest—Letting lodgings—R. S. O. c. 132, s. 5—Fraudulent conveyance—Attack under claim of third person acquired by person himself estopped.*

Where a married woman, living in a house furnished by her husband and supporting herself during his temporary absence in search of employment, lets lodgings and supplies necessities to the lodger, she cannot recover from the lodger the money due as earned by her in an employment or occupation in which the husband has no proprietary interest.

Where a creditor takes the benefit of a conveyance alleged to be fraudulent, and on that ground fails in his action attacking it, the acquiring by him of a small claim and the bringing of another action upon it is an abuse of the process of the Court.

Judgment of a Divisional Court, 27 O. R. 428, 16 Occ. N. 186, reversed.

*J. H. Jones*, for the appellant.

*W. Cassels*, Q.C., and *B. E. Swayzie*, for the respondent.

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#### BEATTIE v. WENGER.

*Bankruptcy and insolvency—Assignments and preferences—Pressure—Security—R. S. O. c. 124, s. 3 s.-s. 3; s. 19, s.-s. 4.*

The doctrine of pressure may still be invoked in order to uphold a transaction impeached as a preference, when it is not

attacked within sixty days, or when an assignment for the benefit of creditors is not made within that time.

The liability of the indorser of a promissory note made by the debtor, held by the creditor for part of his debt, is not a "valuable security" within the meaning of s.-s. 3 of s. 3 of R. S. O. c. 124; and if such a note is given up by the creditor to the debtor, in consideration of a transfer of goods impeached as a preference, the liability cannot be "restored" or its value "made good" to the creditor, or the indorser compelled to again indorse.

What is referred to in this sub-section is some property of the debtor which has been given up to him or of which he has had the benefit; some security upon which the creditor, if still the holder of it, would be bound to place a value under s.-s. 4 of s. 19 of R. S. O. c. 124.

Judgment of a Divisional Court reversed.

*W. R. Riddell and Mearns*, for the appellant Wenger.

*W. C. McKay*, for the appellant Campbell.

*Garrow, Q.C.*, for the respondent.

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Boyd, C.]

*In re* FERGUSON, BENNETT v. COATSWORTH.

*Will—Construction—"My own right heirs"—Condition precedent.*

A testator, who left him surviving his widow and one daughter, devised by his will specifically described property to his daughter, and devised the residue of his estate to his executors upon trust for his widow and daughter in certain events, with limited power to the daughter to dispose thereof by will. He then directed that "in case my daughter shall have died without leaving issue her surviving and without having made a will as aforesaid, my trustees shall (after the death of my wife, if she survive my said daughter) sell all my estate, real and personal, and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter, whichever may last take place."

The daughter died unmarried in her mother's lifetime, having made a will assuming to dispose of the residue.

*Held*, that the daughter was entitled to take as the "right heir" of the testator.

*Bullock v. Downes*, 9 H. L. C. 1; *Re Ford*, *Patten v. Sparks*, 72 L. T. N. S. 5; *Brabant v. Lalonde*, 26 O. R. 879; and *Thompson v. Smith*, 28 A. R. 29, referred to.

MACLENNAN, J.A., held also that upon the language of the will, apart from the clause above set out, the daughter took in fee, subject to the widow's rights, and that failure to make a will was a condition precedent to this clause taking effect.

Judgments of BOYD, C., in *Coatsworth v. Carson*, 24 O. R. 185, 13 Occ. N. 462, and *In re Ferguson*, *Bennett v. Coatsworth*, 25 O. R. 591, 14 Occ. N. 444, set aside upon grounds not argued before him.

*O. R. Macklem*, for the appellant.

*W. Mortimer Clark*, Q.C., for the personal representative of the testator's daughter.

*Moss*, Q.C., and *J. W. McCullough*, for the grandnephews and grandnieces of the testator.

*F. E. Hodgins*, for the personal representatives of Jane Ferguson.

*J. R. L. Starr*, for the personal representatives of Jane Ball.

## McDONALD v. DICKENSON.

## FREEMAN v. DICKENSON.

### *Negligence—Nuisance—Highway—Drain-tiles.*

Leaving drain-tiles in a pile at the side of a highway, while repairs thereto are being lawfully made, is not negligence, and does not constitute a nuisance, and no action lies for injuries resulting from a horse taking fright at the tiles and running away.

Judgment of BOYD, C., reversed; OSLER, J.A., dissenting.

*J. A. McLean* and *W. K. Cameron*, for the appellants.

*J. A. Robinson*, for the respondents.

ARMOUR, C.J.]

*In re* CAUGHELL AND BROWER.

*Arbitration and award—Voluntary submission—Motion to set aside award—  
Time—52 V. c. 13.*

A motion to set aside an award made under a voluntary submission must be made before the expiration of the term next after publication of the award, even if three months have not expired.

*In re Prittie and City of Toronto*, 19 A. R. 508, considered.

Construction of 52 V. c. 13 discussed.

Remarks as to the necessity of revision of the legislation as to arbitrations.

Judgment of ARMOUR, C.J., 16 Occ. N. 249, affirmed.

*Clute*, Q.C., and *T. W. Crothers*, for the appellant.

*E. D. Armour*, Q.C., and *J. A. McLean*, for the respondent.

MEREDITH, C.J.]

HARNWELL v. PARRY SOUND LUMBER COMPANY.

*Master and servant—Contract for defined term—Continuance of employment—  
Right to dismiss.*

Where a bookkeeper is engaged for the term of one year, and his employment is continued after the expiration of that time, there is no presumption that it is to continue for another year. The employer may dismiss him at any time upon reasonable notice, and in this case, there being no evidence of usage to the contrary, three months' notice was held to be reasonable.

Judgment of MEREDITH, C.J., reversed.

*Osler*, Q.C., and *W. M. Douglas*, for the appellants.

*W. K. Cameron*, for the respondent.

ROSE, J.]

SMITH v. PEARSON.

*Covenant—Indemnity—Release—Sale of land.*

A covenant by a purchaser with his vendor that he will pay the mortgage moneys and interest secured by a mortgage upon



the land purchased, and will indemnify and save harmless the vendor from all loss, costs, charges, and damages sustained by him by reason of any default, is a covenant of indemnity merely, and if, before default, the purchaser obtains a release from the only person who could in any way damnify the vendor, he has satisfied his liability.

Judgment of Rose, J., affirmed.

*E. Taylour English* and *Allan McNab*, for the appellant.

*Snow* and *C. P. Smith*, for the respondent.

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### PETMAN v. CITY OF TORONTO.

*Municipal corporations—Local improvements—Increase of cost.*

The extension of a street was petitioned for as a local improvement by the requisite number of owners, and the petition was acceded to by the council, the cost being estimated at \$14,000, and an assessment for that sum being adopted by the Court of Revision, after notice to the persons interested. After some delay, the council purchased the land required, at a price much greater than the estimate, and passed a by-law levying over \$36,000 for the work. No work was done on the ground, and no notice of the second assessment was given.

*Held*, that an opportunity of contesting the second assessment should have been given, and that the by-law was invalid.

Judgment of Rose, J., affirmed.

*Fullerton*, Q.C., and *T. Caswell*, for the appellants.

*William Macdonald*, for the respondent.

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### HOPE v. MAY.

*Bankruptcy and insolvency—Assignments and preferences—Agreement to give chattel mortgage—Bills of sale and chattel mortgages—Change in statute law—Registration of agreement—59 V. c. 34.*

An agreement by the debtor to give to his creditor, upon default in payment or upon demand, a chattel mortgage upon his "present and future goods and chattels" confers no title upon the creditor as against the debtor's assignee for the benefit of creditors.

*Kerry v. James*, 21 A. R. 888, considered.

Judgment of ROSE, J., affirmed.

After judgment in the assignee's favour, the Act 59 V. c. 84 (O.) was passed, and the agreement in question was registered.

*Held*, that this did not validate it.

*J. J. Scott*, for the appellants.

*John MacGregor* and *R. G. Smyth*, for the respondent.

ROBERTSON, J.]

### TENNANT v. MACEWAN.

*Bankruptcy and insolvency—Assignments and preferences—Assignee's commission and expenses—Deputy resident out of Ontario—R. S. O. c. 124, s. 3, s.-s. 6.*

Where an assignment for the benefit of creditors is made by a resident of Ontario, to an assignee residing in Ontario, but all the work in connection with the assignment is done by the assignee's partner residing in Montreal, the assignee cannot recover as against the assignor or retain out of his estate any commission or expenses.

Judgment of ROBERTSON, J., affirmed.

*George Kerr* and *N. W. Rowell*, for the appellant.

*H. D. Gamble* and *H. L. Dunn*, for the respondent.

*Irving*, Q.C., for the Attorney-General for Ontario.

STREET, J.]

### McKIBBON v. WILLIAMS.

*Improvements under mistake of title—Mortgage by person making them—Enforcement thereof against true owner—Interest—Set-off of rents and profits—Occupation rent—Assigns—R. S. O. c. 100, s. 30.*

A purchaser of land made lasting improvements thereon, under the belief that he had acquired the fee, and then made a mortgage in favour of a person who took in good faith under the same mistake as to title. Subsequently it was decided that

the purchaser had acquired only the title of a life tenant. The mortgagee was never in possession.

*Held*, that the mortgagee was an "assign" of the person making the improvements within the meaning of s. 80 of R. S. O. c. 100, and had a lien to the extent of his mortgage which he was entitled to actively enforce.

*Held*, also, that the value of the improvements should be ascertained as at the date of the death of the tenant for life, and that there should be as against the mortgagee a set-off of rents and profits or a charge of occupation rent, only from that date till the date of the mortgage.

*Held*, also, that interest should be allowed on the enhanced value from the date of the death of the tenant for life.

Judgment of STREET, J., affirmed.

*J. W. Nesbitt*, Q.C., for the appellants.

*McBrayne*, for the respondent Williams.

*H. Cassels*, for the respondent McKibbon.

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### GORDON v. WARREN.

*Husband and wife—Separate property—Covenant—Mortgage.*

Personal estate settled upon a married woman for her separate use for life, without power of anticipation, and after her death to such uses as she might by deed or will appoint, and in default of appointment then over, is not separate property in reference to which the married woman can be presumed to have contracted.

A married woman may show, in answer to an action against her upon a covenant in a mortgage given by her to secure part of the purchase money of land conveyed to her, that she was acting merely as trustee for her husband, and did not take the land as her separate property.

Judgment of STREET, J., reversed.

*Carey*, for the appellant.

*Ludwig*, for the respondent.

## FAULKNER v. CLIFFORD.

*Jury—Findings—Failure to answer question—Effect of—Judgment—New trial—Right to, without motion for.*

At the trial of an action for negligence causing the death of a servant of the defendants, the jury, in answer to questions, found that the defendants were guilty of negligence which caused the accident, and assessed the plaintiffs' damages, but disagreed as to and did not answer a question put to them as to whether the deceased, with knowledge of the danger, voluntarily incurred the risks of the employment.

*Held*, that judgment could not, under the circumstances, be entered either for the plaintiffs or the defendants.

Decision of STREET, J., affirmed.

*Held*, also, that as soon as a judgment was given, to which both parties yielded, that no judgment could be given for either of them on the findings, there was an end of the trial, and either party was at liberty to give a new notice of trial and again to enter the action for trial, as upon a disagreement of the jury, without moving to set aside the findings and for a new trial.

Decision of STREET, J., reversed.

*McDermott v. Grout*, 16 P. R. 215, 14 Occ. N. 431, approved.

*Stevens v. Grout*, 16 P. R. 210, 14 Occ. N. 424, overruled.

*McBrayne*, for the appellants.

*Lynch-Staunton*, for the respondents.

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## HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 12TH DECEMBER, 1896.]

## REGINA v. SIMPSON.

*Criminal law—Procedure—Appeal—Police magistrate—Stated case—Offence under Ontario statute—Criminal Code, s. 900—R. S. O. c. 74, s. 1.*

An incorporated company, carrying on the business of a departmental store, and having a drug department under the management of a duly qualified and registered pharmaceutical chemist, who had obtained his certificate under the Pharmacy

Act, R. S. O. c. 151, were charged with breach of s. 24 of the Pharmacy Act, in unlawfully keeping open shop for retailing, dispensing, and compounding poisons, etc., before a police magistrate, who dismissed the charge, but, at the request of the prosecutor, stated a special case for the opinion of the Court.

*Held*, that there was no power to state a case, for the alleged offence being for the breach of an Ontario statute, the procedure provided by Ontario legislation applied, having regard to R. S. O. c. 74, s. 1, and the proper procedure was by an appeal to the Sessions, and not by the stating of a case under s. 900 of the Criminal Code.

The proceeding upon the stated case is an appeal.

*Osler*, Q.C., and *E. T. Malone*, for the private prosecutor.

*Ritchie*, Q.C., *Shepley*, Q.C., and *Ludwig*, for the defendants.

[BOYD, C., FERGUSON, J., MEREDITH, J., 17TH DECEMBER, 1896.]

### RODGER v. MORAN.

*Administrator ad litem—Devolution of Estates Act—Action to set aside tax sale—54 V. c. 18, s. 1—56 V. c. 20, s. 3.*

Ellen Quirk died intestate on 15th January, 1887, possessed of certain lands. In 1891 the lands were sold by tax sale, and the deed given in December, 1892. In a certain action of *Fitzgerald v. Quirk*, brought for the administration of the estate of Ellen Quirk, by one of the next of kin, the present plaintiff was appointed administrator *ad litem*; and he now brought this action to set aside the tax sale.

*Held*, that he had no *locus standi*; the title to the lands, assuming the tax sale invalid, being not in him, but in Ellen Quirk's heirs. See 54 V. c. 18, s. 1; 56 V. c. 20, s. 3. The order appointing the plaintiff administrator *ad litem*, at most, merely gave him the right to carry on the administration proceedings then pending, or any other proceedings of the like nature that might thereafter be commenced.

*Per MEREDITH, J.—Quare*, whether the plaintiff sufficiently represented the estate under the order in question even for the purposes of the proceeding for which he was appointed.

*Aylesworth*, Q.C., for the plaintiff.

*Rowell* and *Lucas*, for the defendants.

[MEREDITH, C.J., MACMAHON, J., 12TH JANUARY, 1897.]

COUSINS v. CRONK.

*Amendment—Order of Court—Accidental slip or omission—Rules 536, 780—  
Carelessness—Delay—Terms.*

In an action for the recovery of land, one of the defendants alleged that he was not and never had been in possession, and disclaimed title. At the trial the action was dismissed as against all the defendants with costs. This was reversed by a Divisional Court upon appeal, and all of the defendants, except an infant, were ordered to pay the plaintiff's costs. The disclaiming defendant was not represented upon the appeal, being advised that he was not concerned in or affected by it. His position was not brought to the notice of the Court, and the order proceeded upon the hypothesis that the position of all the adult defendants was the same. His solicitors were served with minutes of the order containing the above direction as to costs, but he was not represented upon the settling of it, and took no steps to correct the error until some months afterwards, when his goods were seized under an execution for the costs.

*Held*, upon a motion to amend or vary the order as to costs, that the Court, in the exercise of its inherent powers over its records, or the powers conferred by Rule 780, could correct an error arising from an accidental slip or omission in its order; and could now make the order as to the applicant's costs which would have been made originally had attention been called to his position and the nature of his defence.

*Held*, also, that he was entitled to relief under Rule 536, as amended by Rule 1454, as a party who, through mistake, had not been represented upon the argument of the appeal.

*Held*, also, that the carelessness and delay of the applicant did not disentitle him to relief, though they afforded ground for imposing terms upon him.

And the Court, being of opinion that his defence was sustained by the evidence at the trial, amended the order by excluding him from the direction as to payment of the plaintiff's costs by all the adult defendants, and by inserting a provision that the Court did not see fit to make any order as to his own costs, upon payment by him of the costs of the application and the sheriff's fees, and upon his undertaking to bring no action

against the plaintiff or the sheriff for anything done under the execution.

*Masten*, for the applicant.

*W. R. Riddell*, for the plaintiff.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 12TH JANUARY, 1897.]

### RUSSELL v. FRENCH.

*Mechanics' liens—Materials—Extent of lien—Drawback—59 V. c. 35, s. 6.*

In an action to enforce a mechanic's lien for materials, it appeared that \$873.20 was due to the plaintiff by the contractors. The contract price was \$2,858. After work had been done under the contract to the certified value of \$1,593.75, of which the owners had paid \$1,275 to the contractors and \$23.20 to wage-earners on preferred claims, the contractors were dismissed under the terms of the contract, and the owners completed the work at a cost of \$983.

*Held*, that the plaintiff was entitled under s. 10 of the Mechanics' and Wage-Earners' Lien Act, 1896, 59 V. c. 35, to a charge upon a fund calculated at twenty per cent. on \$1,593.75, after deducting \$23.20.

Since the alteration in the law by s. 6, the cases of *Goddard v. Coulson*, 10 A. R. 9, *Re Cornish*, 6 O. R. 259, and *Re Sear and Woods*, 23 O. R. 474, are no longer applicable.

*J. H. Denton*, for the plaintiff.

*Snow*, for the defendants Carroll *et al.*

[14TH JANUARY, 1897.]

### COTÉ v. HALLIDAY.

*Division Court—Appeal—R. S. O. c. 51, s. 148—Appeal direct from judgment at trial—Jurisdiction—Costs.*

An appeal by the plaintiffs from the judgment of the 9th Division Court in the county of Huron dismissing as against the defendant Hunter an action upon a promissory note.

*Held*, that there was no jurisdiction to hear the appeal because it was taken directly from the judgment at the trial, and not from an order upon an application for a new trial : s. 148 of the Division Courts Act, R. S. O. c. 51.

*Held*, also, that this Court had jurisdiction in quashing the appeal for want of jurisdiction to give costs to the opposing party who raised the objection to the jurisdiction.

Appeal quashed with costs settled and allowed at \$10.

*Clute*, Q.C., for the plaintiffs.

*D. Armour*, for the defendant Hunter.

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[15TH JANUARY, 1897.]

### PARKES v. BAKER.

*Security for costs—Public officer—59 V. c. 18, s. 7—Pleading—Affidavits.*

Where a person who holds a public office is made defendant in an action, the pleadings must be looked at to determine whether he is sued in his capacity of a public officer, and so entitled to security for costs under s. 7 of the Law Courts Act, 1896; and if the pleadings are of such a character that the case cannot on them go to the jury against the defendant as a public officer, he cannot claim the protection of the statute, even where he shows by affidavits that his sole connection with the matters alleged against him was in his public capacity.

*C. J. Holman*, for the plaintiff.

*R. McKay*, for the defendant Northmore.

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[ARMOUR, C.J., FALCONBRIDGE, J., 16TH JANUARY, 1897.]

### McVEAIN v. RIDLER.

*Arrest—Discharge—Order for—County Court—Appeal—Divisional Court—Rule 1051—Intent to quit Ontario—Intent to defraud creditors.*

Upon an appeal by the plaintiff from an order of the Judge of a County Court, in an action in that Court, discharging the defendant from the custody of his bail, it was objected by the defendant that the order was not a final one, and that no appeal lay.



*Held*, that the Court had, by Rule 1051, jurisdiction to discharge or vary the order, as explained in *Elliott v. McCuaig*, 18 P. R. 416.

*Held*, also, upon the evidence, that the defendant should not have been discharged from custody.

*Tooth v. Frederick*, 14 P. R. 287, not followed, having been practically overruled by *Coffey v. Scane*, 22 A. R. 269.

*D. R. McLean*, for the plaintiff.

*John MacGregor* and *T. E. Williams*, for the defendant.

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[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 18TH JANUARY, 1897.]

### HUTCHINSON v. LAFORTUNE.

*Will—Construction—Division of estate—“Equally divided between my wife and my brother and sister.”*

An appeal by the defendants Newman and Brady from the judgment of MEREDITH, J., at the trial, in an action for the construction of the will of Arnold Rudolph Newman, deceased.

A clause of the will directed that, after the death of the testator's mother, his estate should be sold and the proceeds “equally divided between my wife and my brother and sister.”

*Held*, affirming the judgment of MEREDITH, J., that by this clause the widow was entitled to half the proceeds, and the brother and sister, the appellants, to the other half to be divided equally between them.

*Dowler*, for the appellants.

*Wells*, Q.C., for the plaintiffs, the executors.

*W. M. Douglas*, for the defendants Lafortune, the widow, and Hunter, a mortgagee.

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### GRANT v. COOK.

*Judgment debtor—Examination—Right to issue appointment for.*

A judgment creditor is *prima facie* entitled to issue an appointment for the examination of his judgment debtor; and, upon a motion to commit the latter for refusal to be sworn, it

is for him to show affirmatively that the issue of the appointment was an abuse of the process of the Court.

*Tremear*, for the plaintiff.

*J. J. Warren*, for the defendant.

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[MEREDITH, C.J., 22ND DECEMBER, 1896.]

TOWNSEND v. TORONTO, HAMILTON, AND BUFFALO  
RAILWAY COMPANY.

*Liquidated damages—Equitable relief—Judicature Act, s. 52, s.-s. 3.*

Under a covenant contained in a lease granting to a railway company a right of way over certain lands, for the purpose of a switch to a gravel pit, the lessees, on default in removing the tracks and ties from the land within fifteen days from the termination of the lease, were to forfeit and pay to the lessor \$5 a day as liquidated damages, and not as a penalty, for each day after that time that the lands and premises should remain in any way obstructed.

*Held*, that such damages must be treated as liquidated ; but that under s. 52, s.-s. 3, of the Judicature Act, 1895, which applies to a case of this kind, the Court is empowered to grant such relief as may be deemed advisable.

*J. C. Rykert*, for the plaintiff.

*D'Arcy Tate*, for the defendants.

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[FERGUSON, J., 14TH JANUARY, 1897.]

BEATON v. BOYD.

*Limitation of actions—R. S. O. c. 111, s. 23—Judgment—Costs—Charge on land—Petition for sale of land—Lapse of time.*

By the judgment in the action dated 21st October, 1881, the plaintiff was ordered to pay the guardian *ad litem* of the infant defendants their costs of the action ; and it was provided that, upon such payment, the plaintiff should have, and he was thereby declared to have, a charge, for the sum paid, upon the interest of the infant defendants in a certain lot, describing it. The plaintiff

duly paid the costs to the guardian *ad litem* on the 12th January, 1882. The judgment contained no personal order against the infant defendants. In December, 1896, the plaintiff presented a petition to the Court praying for a sale of the lot in order to satisfy his charge against it.

*Held*, that R. S. O. c. 111, s. 23, applied, and that the claim was barred by limitation of time under that section.

Petition dismissed with costs.

*Kilmer*, for the petitioner.

*W. H. P. Clement*, for the respondent.

[FALCONBRIDGE, J., 28TH OCTOBER, 1896.]

### ATKIN v. CITY OF HAMILTON.

*Railway—Highway crossing—Accident—Damages.*

Where a highway in a city was crossed by a railway, the rails being raised some two feet above the sidewalk, the part between the rails being filled in with broken tiles, over which loose boards were placed, and the plaintiff, in attempting to get over the crossing to reach her destination at a point beyond the tracks—the street in question being the only mode of access thereto—slipped and was injured, the railway company were held liable therefor.

*Keachie v. City of Toronto*, 22 A. R. 871, distinguished.

*J. W. Nesbitt*, Q.C., for the plaintiff.

*Mackelcan*, Q.C., for the defendants the corporation of the city of Hamilton.

*Carscallen*, Q.C., for the defendants the Toronto, Hamilton, and Buffalo R. W. Co.

[STREET, J., 10TH NOVEMBER, 1896.]

### SMITH v. EGAN.

*Receiver—Equitable execution—Share in estate of which execution debtor is administrator—Injunction.*

At the instance of execution creditors, who had an unsatisfied judgment against a debtor, a receiver was appointed to

receive the debtor's share of his deceased wife's estate, of which he was the administrator; and an injunction was granted restraining him from transferring, interfering, or dealing with such share until the further order of the Court.

*G. M. Macdonnell, Q.C., for the plaintiffs.*

*Douglas Armour, for the defendant.*

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[13TH NOVEMBER, 1896.]

PATCHING v. SMITH.

*Landlord and tenant—Rent payable in advance—Breach of covenant not to assign without leave—Damages.*

Where, a couple of days prior to the accruing due of a quarter's rent payable in advance, the lessee assigned without the lessor's leave; in an action for damages for breach of a covenant therefor contained in the lease, the lessor was held entitled to recover as damages the rent so payable in advance, without any deduction for rents realized during the said quarter under new leases created by the lessor, who, finding the property vacant, had taken possession.

*W. M. Douglas, for the plaintiff.*

*Talbot Macbeth, for the defendant.*

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IN CHAMBERS.

[BOYD, C., 16TH JANUARY, 1889.]

BOYD v. SPRIGGINS.

*Affidavit—Notary—Seal.*

An affidavit sworn before a notary public in Ontario should be authenticated by his seal of office.

[NOTE.—This decision was not before Street, J., when he decided *Re Ryan, Ryan v. Sutherland*, ante 9, and he subsequently expressed his concurrence in the Chancellor's view.]

[20TH JANUARY, 1897.]

CAMERON v. McLEAN.

MONES v. McCALLUM.

*Receiver—Equitable execution—Administration action—Status of receiver—  
Parties—Judgment debtor—Addition of—Rule 324 (b).*

A receiver appointed by way of equitable execution has no greater rights of action than persons for whom he is receiver, and if the judgment creditor cannot proceed to administer an estate in order to make available the interest of his judgment debtor as a beneficiary therein, no more can the officer of the Court styled the receiver; nor can the Court compel the judgment debtor to help his creditor to recover the fruits of an adverse judgment, either by adding him, without his consent, as a co-plaintiff in an action brought by the receiver for administration—against doing which Rule 324 (b) is conclusive—or by allowing the receiver to bring a new action in the name of the judgment debtor for the same purpose.

*Stuart v. Grough*, 14 O. R. 257, and *McLean v. Allen*, 14 P. R. 290, not followed.

*Allen v. Furness*, 20 A. R. at p. 40; *In re Potts*, 10 Mor. B. C. at p. 66; and *Flegg v. Prentiss*, [1892] 2 Ch. at p. 430, specially referred to.

*McGuin v. Fretts*, 18 O. R. 703, and *Bank of London v. Wallace*, 18 P. R. 176, distinguished.

*Idington*, Q.C., for the plaintiff Cameron.

*F. R. Cameron*, for the defendant McLean.

[25TH JANUARY, 1897.]

*In re McDONALD v. DOWDALL.*

*Prohibition—Division Court—Interest—Splitting demand—R. S. O.  
c. 51, s. 77.*

Where the plaintiff sued in a Division Court for \$100 interest upon moneys deposited with the defendants, and it appeared that she had treated the deposit receipt in her hands as one upon which the whole sum was past due and collectable:—

*Held*, that the action came within s. 77 of the Division Courts Act, R. S. O. c. 51, whereby the splitting of causes of action is forbidden; and prohibition was granted.

*In re Clark v. Barber*, 26 O. R. 47, followed, but commented on as irreconcilable with such cases as *Dickenson v. Harrison*, 4 Pri. 282, approved in *Attwood v. Taylor*, 1 M. & G. 807.

*J. E. Jones*, for the defendant Kirkland.

*Masten*, for the plaintiff.

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[MEREDITH, C.J., 29TH JANUARY, 1897.]

### WALTERS v. DUGGAN.

*Security for costs—Præcipe order—Motion to set aside—Security for costs of—Rule 1251.*

A plaintiff may move to set aside a præcipe order requiring him to give security for costs, notwithstanding the stay of proceedings imposed thereby, without giving security for costs; and, where his writ of summons is specially indorsed, he is not compelled to follow the procedure indicated in Rule 1251, which is inapplicable unless he is moving for summary judgment under Rule 789.

*Thibaudeau v. Herbert*, 16 P. R. 420, 15 Occ. N. 103, distinguished.

*R. H. R. Munro*, for the plaintiff.

*W. R. Smyth*, for the defendant.

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[STREET, J., 18TH JANUARY, 1897.]

### *In re* BENFIELD AND STEVENS.

*Interpleader—Jurisdiction—Mining agreement—Construction—Lease or license—Foreigners—Foreign debt.*

Under an agreement with respect to a mining property in this Province, payment was to be made in a foreign country to foreigners residing therein, being second mortgagees in possession, by a person also residing therein, of a sum of money for

each ton of ore mined by him. A large sum due under the terms of this agreement was claimed by the payees named in it, and also by the first mortgagee of the property, who was within the jurisdiction.

*Held*, that, upon the true construction of the agreement, it was a mere license to mine, not conferring an exclusive possession of the property, and a mere agreement for the sale and purchase of the ore when mined; and therefore the first mortgagee had no right of action for the money, but, at the most, only a claim for unliquidated damages for the wrongful removal of ore; and the licensee was not entitled to an interpleader order.

*Held*, also, affirming the decision of the Master in Chambers, 17 P. R. 800, *ante* 10, that the Court had no jurisdiction to compel foreigners to come here with their claim and litigate it, the debt in question having no existence here.

*Credits Gerundense v. Van Weeds*, 12 Q. B. D. 171, distinguished.

*W. E. Raney*, for Benfield, the appellant.

*W. H. Biggar*, for Richardson, the claimant.

*J. Bicknell*, for Stevens *et al.*, the respondents.

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## NOVA SCOTIA.

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### In the Supreme Court.

[IN BANG, 15TH DECEMBER, 1896.]

#### REGINA v. McDONALD.

*Canada Temperance Act—Summary conviction—Stipendiary magistrate—Territorial jurisdiction—Statute defining municipalities.*

The prisoner applied for discharge from custody under a warrant reciting a summary conviction for an offence against the Canada Temperance Act. The conviction alleged that the offence had been committed at "Hopewell, in the county of

Pictou," and was signed by the stipendiary magistrate "for the municipality of the county of Pictou." The municipality of the county of Pictou includes all the county outside the incorporated towns: 58 V. c. 8, s. 2. Schedule A of that Act shows Hopewell to be a polling section within the municipality.

It was contended on the argument that the conviction was bad because it did not show that Hopewell was within the municipality.

*Held*, that the Court could look at the Act to show that Hopewell was within the municipality; that the conviction was therefore good on its face; and that the application for the prisoner's discharge should be refused.

*W. B. A. Ritchie*, Q.C., for the defendant.

*H. Mellish*, contra.

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## IN CHAMBERS.

[TOWNSHEND, J., 12TH DECEMBER, 1896.]

### CONRAD v. CUNNINGHAM.

*Receiver—Equitable execution—Contingent interest in estate—Interest in shares of company.*

The defendant was entitled to an interest in the estate of Thomas Alexander Anderson, contingent upon the death of the widow of Thomas Alexander Anderson, who had a life interest therein. He was also interested in the capital stock of two incorporated gold mining companies. The plaintiff recovered judgment against the defendant and issued execution, which was returned *nulla bona*. He thereupon applied for a receiver by way of equitable execution.

TOWNSHEND, J., granted an order appointing the Eastern Trust Company receiver without security, following *Fuggle v. Bland*, 11 Q. B. D. 711, and *Hewitt v. Murray*, 45 L. J. Ch. 572.

*J. A. Chisholm*, for the plaintiff.

*W. B. MacCoy*, for the defendant.



[30TH DECEMBER, 1896.]

## REGINA v. WELLS.

*Arrest—Execution for costs—Irregularities in writ—Remedy—Habeas corpus.*

The defendant being held in custody under execution for costs, an application for a writ of habeas corpus was made on the following grounds :—

1. Crown Rule 138 requires that “ every writ of execution shall be made returnable immediately after the execution thereof.” The writ in this case required the sheriff to “ make due return of this writ,” etc.

2. The writ recited the order for costs as being made on the 19th November, 1896, whereas it was made on the 19th November, 1895.

3. The solicitor signed as “ plaintiff’s solicitor,” whereas he acted only for the prosecutor, and on the back of the writ gave directions to the sheriff as “ W. H., solicitor for A. B.,” the prosecutor.

*Held*, that each one of these objections, if material at all, was amendable. “ Due return ” means in the time prescribed by law, and therefore follows the Rule. As to the second objection, the mistake in the date of the order was simply a clerical error ; and as to the third objection, the indorsement sufficiently complied with the rule.

As there was nothing on the face of the writ or in the irregularities making the detention illegal or the process void, it was not a proper case for a habeas corpus. The proper course was to move to set the execution aside.

Reference to Church on Habeas Corpus, ss. 383, 384.

*H. V. Bigelow*, for the applicant.

*W. H. Fulton*, contra.

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CORRECTION.

In a note of a Nova Scotia case, *ante* p. 11, for “ Slowmwhite v. Archibald ” read “ Slauenwhite v. Archibald.”

## NEW BRUNSWICK.

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In the Supreme Court.

IN CHAMBERS.

[McLEOD, J., 31st DECEMBER, 1896.]

*Ex parte* CARMAN.

*Arrest—Wrong name—Discharge.*

The prisoner, Gehardus Clowes Carman, was arrested and confined in the common gaol of the city and county of St. John on an execution issued against George C. Carman.

*Held*, that the prisoner, being arrested and imprisoned under the wrong name, was entitled to his discharge from custody. Sheriff and gaoler exempted from liability.

*W. B. Wallace*, for the prisoner.

*G. G. Ruel*, contra.

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[9TH JANUARY, 1897.]

WATTRICH v. THORNTON.

*Executory contract—Implied warranty—New trial.*

Review from the town of Woodstock Civil Court.

The plaintiff, who was a maker of surgical instruments, made an instrument to be worn by the defendant as a support to his back, which had been injured in an accident, and, in the presence of a physician, who gave him the order, tried the instrument three times on the defendant without making it complete for use. The defendant refused to accept it, and this action was brought for the price or for damages. It was tried

before the police magistrate for the town, with a jury, who found a verdict for the defendant.

A new trial was refused.

*Jones v. Just*, L. R. 8 Q. B. 197, referred to.

*L. A. Currey*, Q.C., for the plaintiff.

*Silas Alward*, Q.C., for the defendant.

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## In the County Court.

### IN CHAMBERS.

[FORBES, J.C.C., 2ND JANUARY, 1897.]

*Ex parte* STURDEE.

*In re* KELLY.

*Assignments and preferences—Assignee for benefit of creditors—Remuneration—Appeal.*

Under the Act respecting Assignments and Preferences by Insolvent Persons, 58 V. c. 6 (N.B.), S., a sheriff, was appointed assignee of the estate of K. and M., insolvents. At a meeting of the creditors some time after his appointment, the assignee was voted the sum of \$800 as remuneration for his services, which he refused to accept, but offered to take \$500. The creditors would give no more than the \$300. The assignee appealed to the Judge of the County Court of the city and county of St. John, making his bill out for \$828.40, to be taxed by the Judge.

*Held*, dismissing the appeal, that the sum of \$300 voted to the assignee by the creditors was amply sufficient.

*Semble*, that where the assignee is a professional man, the Act contemplates that he will use his own professional skill without additional expense to the estate, and in case he should require direction or advice, he should apply for such to the Judge in Equity or the Judge of the County Court.

*L. A. Currey*, Q.C., for the assignee.

*A. P. Barnhill*, for the inspectors.

*J. R. Armstrong*, Q.C., *W. Watson Allen*, and *Scott E. Morrill*, for the creditors.

## MANITOBA.

## In the Queen's Bench.

[TAYLOR, C.J., 9TH JANUARY, 1897.]

## POCKETT v. POOL.

*Plans and surveys—Action for recovery of land—Re-survey of line not correctly run—Invalidity of re-survey—Road used by public—Nonsuit.*

Action for the recovery of possession of land. The plaintiff owned and was in possession of the south-west quarter of section 2, township 16, range 16, west. The defendant was in possession of the south-east quarter of section 8, immediately adjoining the plaintiff's land on the west. The plaintiff's contention was that the line between sections 2 and 8 was not correctly run when township 16 was originally surveyed in 1873, and that a new survey, made in February, 1895, showed the land in question to be part of section 2, and not part of section 8. He based his claim in the action upon the new survey, and his right to recover depended entirely upon the validity of that survey. That the original survey was incorrect, there seemed no doubt, but the defendant questioned the validity of the new survey upon a number of grounds. One of these was that the Governor in Council never directed the new survey to be made.

In 1894 Dickson, a Dominion land surveyor, received instructions from the Surveyor-General to correct the error in the road allowance in question and establish a new meridian road allowance from the south to the north boundary of the township. Dickson made the survey, and in November, 1895, the Minister of the Interior made a report to the Governor in Council that Dickson, under instructions issued by him, had made a new survey of the line in dispute, and recommended that his action in such new survey be ratified; that the original survey be cancelled; and that the new survey made by Dickson be approved. The report was approved by the Governor in Council.

But this mode of proceeding appeared wholly irregular. The Dominion Lands Act, 1889, provides for a new survey being made under the direction of the Governor in council, by an order in council, upon the recommendation of the Minister of the Interior. It nowhere provides for the Minister ordering a re-survey upon his own authority, and then obtaining a ratification of his action in doing so. The cancellation of the original survey by an order in council seemed the first thing to be done, and then a new survey following upon that. The statute gave no power of ratification of such action on the part of the Minister as there was in this case.

Further objections were that, even if the Minister of the Interior had the authority to do what he did, the provisions of the Act were not followed; and that the lands affected by the new survey were not Dominion lands or public lands, and, therefore, no such survey could be made under the Act.

The manner in which the new survey affected the public was another argument against the survey being upheld.

On the roads in this township the municipality had expended a large amount of statute labour, and, it was stated, over \$5,000 in money. The road on the line in question had been a travelled road for many years; the expenditure of statute labour and money would be useless and lost if the re-survey should be upheld.

*Held*, that the objections to the validity of the re-survey taken by the defendant should be sustained and a nonsuit entered with costs.

*Coldwell*, Q.C., for the plaintiff.

*Colin H. Campbell*, Q.C., and *Crawford*, Q.C., for the defendant.

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## NORTH-WEST TERRITORIES

—  
In the Supreme Court.

NORTHERN ALBERTA JUDICIAL  
DISTRICT.

IN CHAMBERS.

[SCOTT, J., 5TH JANUARY, 1897.]

VAN WART v. BURLAND.

HAWKEY v. BURLAND.

*Married woman—Judgment and execution against—Motion to set aside for irregularity—Separate estate—Proprietary or personal judgment—North-West Territories Act, R. S. C. c. 50, s. 40.*

Motions by the defendant to set aside the judgments entered by the plaintiffs against her and the writs of execution issued thereon, on the grounds: (1) that she was a married woman at the time the judgments were entered, and, being personal, not proprietary, judgments, they were irregular and void; and (2) that the executions issued thereon, not being limited to her separate estate, were irregular.

There was nothing on the face of the proceedings in the actions to show that the defendant was sued as a married woman or that she was possessed of separate estate. So far as appeared, she was sued and proceeded against as if she were unmarried. The judgments were obtained by default of appearance.

By her affidavit filed upon these applications the defendant showed that she was a married woman at the time the actions were commenced and when the judgments were entered. From her cross-examination upon her affidavit it appeared that she was married in 1883; that she separated from her husband in

1898; that, with her own money and entirely upon her own account, she carried on a boarding-house in Calgary for about eighteen months, beginning in the autumn of 1894, during which time the indebtedness to the plaintiffs was incurred; and that she owned both real and personal estate when dealing with the plaintiffs. Upon being asked what the indebtedness to the plaintiffs was for, upon the advice of counsel, she refused to answer.

*G. S. McCarter*, for the defendant. The judgments and executions are irregular; both should be limited to separate estate: *Scott v. Morley*, 20 Q. B. D. 120; *Snow's Annual Practice*, 1897, vol. 2, pp. 78, 89; App. F., Form 1 A.; App. H., Form 1 A.

*C. C. McCaul*, Q.C., for the plaintiffs. There is no irregularity in form. The defendant is sued as a *feme sole*, and has not pleaded coverture: *Scott v. Morley*, 20 Q. B. D. at p. 127; *Poole v. Canning*, L. R. 2 C. P. 241; *Dillon v. Cunningham*, L. R. 8 Ex. 28; *Bullen and Leake*, vol. 2, p. 207 *et seq.*; *Palliser v. Gurney*, 19 Q. B. D. 519. The judgments may be supported under, (1) the North-West Territories Act, s. 40; (2) the Land Titles Act, s. 11; or (3) Ordinance No. 20 of 1890. Under (1) the judgment is personal: *Wishart v. McManus*, 1 Man. L. R. 218; *Velie v. Rutherford*, 8 Man. L. R. 168. Under (2) and (3) the judgment is personal also: *Holtby v. Hodgson*, 24 Q. B. D. 108; *Pelton v. Harrison*, [1892] 1 Q. B. 118; *Re Lynes*, [1893] 2 Q. B. 118. See also *Conger v. Kennedy*, 16 Occ. N. 278, 26 S. C. R. 897. The executions are regular as well as the judgments. In any case, the plaintiffs can amend *nunc pro tunc*: *Cameron v. Heighs*, 14 P. R. 56; *Nesbitt v. Armstrong*, *ib.* 366; *Countess of Aylesford v. Great Western R. W. Co.*, [1892] 2 Q. B. 626.

*McCarter*, in reply. The judgments should be set aside without terms: *Anlaby v. Prætorius*, 20 Q. B. D. 764.

*Scott, J.*—Counsel for the defendant relied upon *Scott v. Morley*, 20 Q. B. D. 120, as showing that a judgment against a married woman must direct that the amount thereof shall be payable out of her separate estate, and not otherwise, and that the executions issued thereon must also be limited to such separate estate. That case was decided under the Imperial Married

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Woman's Property Act, 1882, which is not in force in the Territories. (Quotes s. 1, s.-s. 2, of that Act.) From the judgment in that case it clearly appears that it is only applicable to cases where a married woman is sought to be held liable on contracts or obligations which, but for the sub-section quoted, she would not be liable upon. (Quotes remarks of Lord Esher at pp. 125, 127, and of Bowen, L.J., at p. 128; also remarks of Lord Esher in *Holthby v. Hodgson*, 24 Q. B. D. at p. 105, and of Lindley L.J., at p. 108.)

Section 40 of the North-West Territories Act, R. S. C. c. 50, is as follows :

"A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property, declared by this Act, or which is hereafter declared to be her separate property, and shall have, in her own name, the same remedies, both civil and criminal, against all persons whomsoever, for the protection and security of such wages, earnings, money, and property, and of any chattels or other her separate property, for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried."

A similar provision is to be found in the statutes of Ontario and Manitoba, where it has received judicial interpretation. The Ontario cases bearing upon it are fully reviewed by Taylor, C.J., in *Wishart v. McManus*, 1 Man. L. R. 213. In those cases the majority of the Judges appear to hold that the provision referred to does not extend the power of a married woman to contract, but merely defines the procedure which may be adopted in a suit against her upon a contract or engagement on which she may otherwise be liable; that to be liable for separate debts or contracts she must be shown to have separate estate; that she is only liable to the extent of her separate estate; and that a personal order or judgment against her cannot be obtained.

Several of the Ontario Judges, however, take the opposite view as to the effect of the provision.



Wilson, J., in *Wagner v. Jefferson*, 87 U. C. R. 551, says at p. 577 :—" So the ninth section (the provision referred to) seems to make the married woman answerable, whether she has a separate estate or not. She is to be liable not only for her contracts, but for her torts 'as if she were unmarried.' . . . . I am of opinion that the liability of a married woman to suit for torts—and, as it appears to follow as a consequence, on her contracts also,—is of a personal nature, not dependent upon her possession of a separate estate ; that the proceeding against her is not to be considered as under the former law in the nature of a proceeding *in rem*, but as an ordinary suit against a person who is competent to contract and be contracted with. If she has borrowed money and bought goods, and refuses to pay her creditor, why should he not have a judgment against her, and make it available as in any other case so soon as his debtor is in the possession of property."

Also in *Consolidated Bank v. Henderson*, 29 C. P. 549, the same learned Judge, then Chief Justice, says with reference to the same provision (p. 554) : " The principal purpose of our legislation was and is to establish the individuality of the married woman in contemplation of law. It was intended that she should be personally liable upon all her own separate contracts, and for all her own separate contracts, and the statute, in my opinion, says so."

In *Standard Bank v. Boulton*, 3 A. R. 98, Blake, V.-C., granted a personal order against a married woman (see p. 96) ; and in *Clarke v. Creighton*, 45 U. C. R. 514, Armour and Cameron, JJ., appear to have taken the same view as Wilson, C.J., in *Wagner v. Jefferson*.

Taylor, C.J., in *Wishart v. McManus*, also took the same view. At p. 224 he says : " In England the Legislature has used language plain and unmistakable, by saying that damages and costs recovered in an action against a married woman 'shall be payable out of her separate property, and not otherwise.' No such restrictive words are to be found in the Acts of either Ontario or Manitoba, unless in those sections which refer to debts contracted before marriage. To put upon the Act here the construction put upon the Ontario Act by Chief Justice Wilson and Mr. Justice Armour, and which Mr. Justice Cameron thinks should be put upon it, is not, in my judgment, to

extend the meaning of the statute beyond what the Legislature, as I read the Act, intended and have indeed plainly said. On the contrary, to construe the statute as the majority of the Judges have construed it, is to narrow its effect and largely to defeat what I conceive to have been the intention of the Legislature."

The language of Lord Esher and Bowen, L.J., in *Scott v. Morley* appears to support this view. They say that in an action against a married woman in respect of a liability created by the Imperial Act, 1882, the judgment and execution must be limited to her separate estate, because the Act states in unmistakable terms that they shall be so limited, and the judgment and execution should follow the words of the Act. I think it may reasonably be inferred from the words used by them, that, if the Act had not been so directed, no such limitation in the judgment and execution would have been necessary. In fact Lord Esher says, at p. 125, that "if no remedy were given by the Act for a breach of the contract, the remedy must be that common law remedy which is applicable to the case. But, if a remedy is given by the statute which imposes the new liability, that must be the only remedy."

In my opinion, the interpretation put upon the provision by Wilson, C.J., and Armour and Cameron, JJ., in Ontario, and by Taylor, C.J., in Manitoba, so far as it bears upon the questions raised on this application, is the correct one; and I therefore hold that the plaintiffs' judgments and executions are not irregular or void upon either of the grounds stated in the application.

The applications are dismissed with costs.

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## Supreme Court of Canada.

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### IN CHAMBERS.

[GWYNNE, J., 25TH JANUARY, 1897.]

#### MARTIN v. SAMPSON.

*Appeal—Time limit—Commencement of—Pronouncing or entry of judgment  
—Security—Extension of time—R. S. C. c. 135, s. 46.*

On the trial of an action to set aside a chattel mortgage judgment was given in favour of the plaintiff without costs. The Court of Appeal, by a judgment pronounced on the 7th November, 1896, 24 A. R. 1, 16 Occ. N. 870, reversed the decision of the trial Judge and dismissed the action with costs in both Courts. The minutes of judgment were not settled until some days afterwards, and at the time of the settlement the draft minutes were altered by the Registrar of the Court of Appeal by refusing costs to one of the respondents and changing a direction as to the payment over of funds on deposit abiding the decision of the action.

An application was made by the plaintiff to the Registrar of the Supreme Court of Canada, more than sixty days after the judgment was pronounced, for approval of the security upon a proposed appeal to that Court, under s. 46 of R. S. C. c. 135.

*Held*, affirming the decision of the Registrar refusing the application, that nothing substantial remained to be settled by the minutes so as to take the case out of the general rule that the time for appealing runs from the pronouncing of the judgment, and the application was too late.

*George Kidd*, for the plaintiff.

*Hamilton Cassels*, for the defendants.

[GIROUARD, J., 26TH OCTOBER, 1896.]

**MACRAE v. NEWS PRINTING COMPANY OF TORONTO.**

*Appeal—Time limit—Commencement of—Pronouncing or entry of judgment—Security—Extension of time—Order of Judge—Vacation—R. S. C. c. 135, ss. 40, 42, 46.*

On the trial of an action for breach of contract, the plaintiffs obtained a verdict, which a Divisional Court set aside. The Court of Appeal allowed an appeal and restored the verdict, reducing the damages.

*Held*, affirming the decision of the Registrar refusing an application by the defendants for approval of the security upon a proposed appeal to the Supreme Court of Canada, that nothing substantial remained to be settled on entering the formal judgment of the Court of Appeal, and the time for appeal therefrom ran from the pronouncing, and not from the entry, of the judgment.

*O'Sullivan v. Harty*, 18 S. C. R. 481, *Walmsley v. Griffith*, *ib.* 484, and *Martley v. Carson*, *ib.* 489, followed.

By s. 42 of R. S. C. c. 135, the Court proposed to be appealed from or a Judge thereof may allow an appeal after the time prescribed therefor by s. 40 has expired; but an order extending the time will not authorize the Supreme Court of Canada or a Judge thereof to accept security after the sixty days have elapsed.

The delay of sixty days for appealing prescribed by s. 40 is not suspended during the vacation established by Rules of Court.

*O'Gara*, Q.C., for the defendants.

*R. V. Sinclair*, for the plaintiffs.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

ROBERTSON, J.]

[12TH JANUARY, 1897.

JOHNSTON v. CATHOLIC MUTUAL BENEVOLENT  
ASSOCIATION.

*Benevolent society—Rule directing payment to named beneficiaries—Certificate payable to beneficiary's executors—Rights of creditors and legatees—R. S. O. c. 172.*

A certificate issued in favour of an unmarried man by a benevolent society, incorporated under R. S. O. c. 172, directed payment to his executors. The rules of the society required the beneficiary to be named in the certificate, and in default provided for payment to certain named relations of the member, or his next of kin, or to the beneficiary fund of the society.

*Held*, MACLENNAN, J.A., dissenting, that the beneficiary fund did not pass to the member's executors under his will, and that neither creditors nor legatees could claim it, but that the case must be looked upon as one of default of appointment, and the money applied as directed by the rules.

Judgment of ROBERTSON, J., affirmed.

*J. Parkes*, for the appellants.

*Shepley, Q.C.*, and *Campion*, for the respondents.

[25TH JANUARY, 1897.

SCOTTISH ONTARIO AND MANITOBA LAND CO. v.  
CITY OF TORONTO.

*Municipal corporations—Action for not supplying water according to contract—General issue—Notice of action—Reasonable and probable cause—R. S. O. c. 73, ss. 1, 13, 14, 15.*

The plaintiffs alleged that in consideration of their paying to the defendants their charges for the proper supply of pure

water for the plaintiffs' hydraulic elevator, the defendants undertook and agreed to supply the plaintiffs with such water; that in supplying such water the defendants negligently caused and allowed such water so furnished by them during six years prior to the commencement of this action to be impregnated with sand and such deleterious matter held in suspension therein, the water being in such condition, to the knowledge of defendants, that it so greatly damaged the apparatus of the plaintiffs' elevator that the same became totally useless to the plaintiffs, etc., whereby, etc.

The defendants pleaded not guilty by statute, and that it was not expressly alleged that the act complained of was done maliciously and without reasonable or probable cause; that the act complained of was done by them in the execution of their office, etc.; that the act was not caused within six months; and that no notice of action had been given, citing 85 V. c. 79, 41 V. c. 41, ss. 1-3; R. S. O. c. 73, ss. 1, 13, 14, 15.

*Held*, affirming the judgment of ROBERTSON, J., that the action being one for breach of contract, none of the statutory defences set up was applicable or could be pleaded.

*Fullerton, Q.C., and W. C. Chisholm, for the appellants.*

*H. M. Mowat, for the respondents.*

STREET, J.]

[5TH FEBRUARY, 1897.]

### BREESE v. KNOX.

*Fraudulent preference—Chattel mortgage given within sixty days, pursuant to agreement prior to sixty days—Promise of preference—54 V. c. 20.*

Where a debtor on 25th June, 1895, gave an agreement under seal to a creditor that in case he made default in payment of any sum he might owe the creditor, upon demand he would give a chattel mortgage on all his stock in trade; and on 11th November, 1895, executed a mortgage accordingly to the creditor, and on 2nd December, 1895, made an assignment for the benefit of his creditors:—

*Held*, upon action brought by the assignee to set aside the chattel mortgage as a fraudulent preference, that, notwithstanding the said agreement, the Act 54 V. c. 20, s. 1, applied,

and the presumption thereby created was not done away with by reason of the agreement.

*W. R. Riddell*, for the appellants.

*George Kerr* and *R. W. Evans*, for the respondent.

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## HIGH COURT OF JUSTICE.

[*ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 29TH DECEMBER, 1896.*

### BOULTBEE v. GZOWSKI.

*Company—Shares—Sale of—Marginal note transfer—Brokers—Undisclosed principal—Indemnity—Assignment of right to—By-laws of corporation—Restricting recourse to Courts—Cause of action—Statute of Limitations—Commencement of.*

The plaintiff, being owner of shares in a bank, sold and transferred them to C., who on the stock exchange sold them to G., nothing being said as to whether G. was acting as a principal or agent. G. having paid the purchase money, under the practice of brokers C. signed a transfer, with the purchaser's name in blank, and initialled a marginal note giving G. the control and disposal of same. G. initialled a marginal note giving H., who was the real purchaser and his undisclosed principal, control, and he filled in his own name in the transfer as purchaser, and accepted the same. Within a month from the plaintiff's transfer, the bank was ordered to be wound up, and in the liquidation proceedings the plaintiff was made a contributory, and paid a large sum in respect of "double liability."

The plaintiff brought an action for indemnity against C., and recovered judgment, obtained an assignment of all C.'s rights, and then brought an action against G.

*Held*, that the obligation to indemnify arises not from the transfer but from the fact of the purchase; that an agent, dealing in his own name, though really acting for an undisclosed principal, assumes the liability of a principal; and that the transfer, being executed in a form designed to enable G. to pass the shares to H., would not free G.

*Walker v. Bartlett*, 18 C. B. 845, and *Kellock v. Enthoven*, L. R. 9 Q. B. 241, referred to.

*Held*, also, following *Mewburn v. Mackelcan*, 19 A. R. 729, that the recovery of the judgment against C., without payment of it, gave him a cause of action against the person to whom he was entitled to look for indemnity, which, under *British Canadian Loan Co. v. Tear*, 28 O. R. 664, might be assigned by C. and enforced by his assignee.

*Held*, also, that the authority of the Legislature is essential to authorize a corporation to pass any by-laws ousting its members from their right of recourse to the Courts of the Province for the settlement of disputes arising therein.

*Essery v. Court Pride of the Dominion*, 2 O. R. 596, referred to.

*Held*, also, following *Sutherland v. Webster*, 21 A. R. 228, and *Eddowes v. Argentine Loan, etc., Co.*, 63 L. T. N. S. 864, that the mere existence of a liability to indemnify the plaintiff, which might never be enforced, gave no right of action to C., and that therefore the Statute of Limitations did not begin to run until the recovery of the judgment against him.

*Held*, also, that a liability to be called on as a contributory gave the plaintiff no right of action against the person liable to indemnify him, nor is such right accelerated by R. S. C. c. 129, s. 46, and that the statute did not begin to run against him until the liquidators were entitled to immediate payment.

Judgment of MEREDITH, J., reversed.

*H. J. Scott*, Q.C., and *R. Boulton*, for the plaintiff.

*Moss*, Q.C., and *McGregor Young*, for the defendants.

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[25TH JANUARY, 1897.]

## MARSHALL v. CENTRAL ONTARIO R. W. CO.

*Master and servant—Wrongful dismissal—Railways—Road-master—Drinking on duty—Railway Act, 51 V. c. 29 (D.)*

Where a person occupying the position of road-master on the defendants' railway, while on duty in charge of a gang of men on a special train, picking up ties along the road, was proved to have been drinking with the engine-driver and the conductor, from a bottle of whisky, from time to time, during



the trip, such conduct justified his dismissal, as being inconsistent with the faithful discharge of his duty, and prejudicial, or likely to be prejudicial, to the defendants' interests; the dismissal being also justifiable in that his conduct constituted the participation in a criminal offence under s. 298 of the Railway Act, 51 V. c. 29 (D.), which prohibits, under a penalty, etc., anyone giving or bartering spirits or intoxicating liquor to or with any servant or employee of the company while on duty.

*Clute*, Q.C., for the plaintiff.

*W. R. Riddell* and *Monro Grier*, for the defendants.

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[8TH FEBRUARY, 1897.]

### BROWN v. NEFF.

*Action—Issue under Partition Act—Trial in High Court—Judicature Act, 1895, s. 91.*

An appeal by the plaintiff from an order of MEREDITH, J., in Chambers, dismissing an application made by the plaintiff under s. 91 of the Judicature Act, 1895, for an order directing the trial in the High Court of an issue arising out of a proceeding taken under the Partition Act, which issue had been tried in a County Court, when the jury disagreed.

*F. E. Titus*, for the plaintiff, contended that it was a proper case for trial in the High Court, inasmuch as difficult questions of law and fact arose, and that there was jurisdiction to make the order, citing *Symonds v. Symonds*, 20 C. P. 271.

*Swabey*, for the defendant, contended that there was no jurisdiction to make the order because neither the issue nor the proceeding out of which it arose was an "action," and the words of s. 91 of the Judicature Act, 1895, were "in any action pending in a County Court." The same words were used in the Law Reform Act, under which *Symonds v. Symonds* was decided, but in the judgment of the Court the words "in any action" were omitted in quoting the section, and therefore the decision seemed to have proceeded upon a misapprehension, or upon a different enactment from that now in question. The issue here was not an "action:" see the interpretation clause of the Judicature Act, 1895, s. 2, s.-s. 3; *Hamlyn v. Betteley*, 6 Q. B. D. 68.

*Per Curiam*—The decision in *Symonds v. Symonds* must be followed. We cannot assume that it proceeded upon an enactment which had no existence. We must rather suppose that the words "in any action" were omitted in quoting the section, by a printer's error. The case is a proper one for trial in the High Court, and the appeal must be allowed. Costs here and below to be costs in the cause.

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### D'IVRY v. WORLD NEWSPAPER CO.

*Security for costs—Præcipe order—Increased security—Election.*

An appeal by the defendants from an order of MEREDITH, J., in Chambers, affirming an order of Mr. Cartwright, an official referee, sitting for the Master in Chambers, dismissing a motion by the appellants for an order for increased security for costs.

The action was for libel. The plaintiff's residence, as indorsed on the writ of summons, being out of the jurisdiction, the defendants issued a præcipe order for security of costs, with which the plaintiff complied by paying \$200 into Court.

The referee held, following *Trevelyan v. Myers*, 15 Oco. N. 185, that the defendants being elected to take a præcipe order for a definite amount of security, instead of making a special application, were bound by their election, and must abide by it.

J. King, Q.C., for the defendants, contended that *Trevelyan v. Myers* was not well decided, Rule 1250 having made a difference in the practice since *Bell v. Landon*, 9 P. R. 100.

H. M. Mowat, for the plaintiff, was not called upon.

THE COURT dismissed the appeal, not seeing fit to overrule the cases cited, and not perceiving that Rule 1250 made any difference in the practice, as the Court had always power to increase or diminish the security in a proper case.

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[11TH FEBRUARY, 1897.]

### FISKEN v. STEWART.

*County Court appeal—Order dismissing motion for judgment—Finality of.*

An appeal by the plaintiff from an order of the Judge of the County Court of the county of York dismissing an application by the plaintiff for summary judgment under Rule 789.

*Held*, that the order appealed against was not in its nature final, and therefore the appeal did not lie.

*Kingsford*, for the plaintiff.

*W. N. Tilley*, for the defendant.

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[12TH FEBRUARY, 1897.]

SLATER v. MADER.

*County Court appeal—Order enlarging motion to dismiss action—Finality of.*

Motion by the plaintiff to quash an appeal by the defendant Mader from an order of the Judge of the County Court of the united counties of Stormont, Dundas, and Glengarry, enlarging *sine die*, until after the happening of a named event, a motion by the defendant Mader to dismiss the action for want of prosecution.

*Held*, that the order appealed against was not in its nature final, and therefore the appeal did not lie.

*D. Armour*, for the plaintiff.

*F. J. Roche*, for the defendant Mader.

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[15TH FEBRUARY, 1897.]

SIPPRELL v. ARMSTRONG.

*Assignments and preferences—Assignment for benefit of creditors—Claim for damages—Judgment—Right to rank on estate.*

An appeal by the plaintiff from the judgment of the junior Judge of the County Court of Elgin dismissing the action, which was brought to obtain a declaration of the plaintiff's right to rank on the estate of one Ferguson, in the hands of the defendant as assignee for the benefit of creditors, in respect of a claim for damages for malicious prosecution, an action to recover which against Ferguson was begun before the assignment and judgment recovered by the plaintiff after the assignment. This action was not begun until after the recovery of that judgment, the assets of the estate, however, not having been distributed.

*Held*, that, although the facts of this case were not the same as in *Grant v. West*, 28 A. R. 588, the principle of that decision governed ; and the appeal was dismissed with costs.

*J. A. McLean*, for the plaintiff.

*Aylesworth*, Q.C., for the defendant.

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[16TH FEBRUARY, 1897.]

SPEARS v. HARNDEN.

*County Court appeal—Cross-appeal—Necessity for.*

Upon the argument of an appeal by the defendant from the judgment of a County Court in favour of the plaintiff for a part of the amount claimed in the action, it was contended on behalf of the plaintiff that he was entitled to judgment for the whole amount claimed.

*Held*, that there was no power to give effect to the plaintiff's contention without a cross-appeal.

*Delamere*, Q.C., for the plaintiff.

*D. B. Simpson*, for the defendant.

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[MEREDITH, C.J., 11TH FEBRUARY, 1897.]

BUILDING AND LOAN ASSOCIATION v. MCKENZIE.

*Mortgage—Leasehold—Acquisition of reversion—Liability for payment of mortgage—Estoppel.*

Where the assignee of a term subject to a mortgage thereof becomes the owner of the fee by purchase, the reversion in the lands is bound in his hands for the payment of such mortgage, without repayment to him of the purchase money ; and where he has obtained the conveyance of the reversion upon the representation that he is the assignee of the term, he is estopped from saying that he acquired it otherwise than as the conveyance to him shows.

*H. J. Scott*, Q.C., for the plaintiffs.

*Laidlaw*, Q.C., and *D. W. Saunders*, for the defendant.

[MACMAHON, J., 10TH JANUARY, 1897.]

FOSTER v. VILLAGE OF HINTONBURG.

*Municipal corporation—Annual rate limited to two cents—"School rate"—  
Debentures for school house—55 V. c. 42, s. 356.*

The annual amount to pay for debentures issued under a by-law passed for the purchase of a school site and the erection of a school house thereon, comes within "school rates" excluded from the two cents, to which, by s. 356 of the Consolidated Municipal Act, 1892, 55 V. c. 42, the annual rate required to be levied by municipalities is limited.

*G. G. S. Lindsey*, for the plaintiff.

*W. H. P. Clement*, for the defendants.

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[MEREDITH, J., 22ND JANUARY, 1897.]

*In re* CENTRAL BANK OF CANADA.

*Appeal—Leave—Winding-up Act—Successive applications—Special circumstances—Terms.*

Orders having been made in the matter of the winding-up of an insolvent bank for payment of certain moneys out of Court to the executors of the purchaser of the assets, and the moneys having been paid out to them, the Receiver-General for Canada asserted a claim to such moneys under ss. 40 and 41 of the Winding-up Act, R. S. C. c. 129, and, not having been a party to the applications for payment out made by the executors, presented a petition for payment over to him by them or repayment into Court of such moneys, or, in the alternative, for leave to appeal from such orders. This petition was dismissed, upon the ground that the petitioner was not entitled to complain, even if the moneys had been improperly paid out.

Upon an application by the petitioner for leave to appeal to the Court of Appeal from the order dismissing his petition:—

*Held*, that a Judge of the High Court had power to grant the leave sought, the application not being in effect a second application for leave to appeal from the orders for payment out.

And, under all the circumstances of the case, leave to appeal was granted, upon security for costs being furnished, the question being a new and important one and the amount involved considerable.

*Moss*, Q.C., and *F. E. Hodgins*, for the applicant.

*S. H. Blake*, Q.C., and *W. R. Smyth*, for the executors.

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### IN CHAMBERS.

[MEREDITH, C.J., 11TH FEBRUARY, 1897.]

### SMYTH v. STEPHENSON.

*Security for costs—Libel—Newspaper—R. S. O. c. 57, s. 9—Criminal charge—Pleading—Innuendo.*

Where a statement of claim in an action for libel contained in a public newspaper is not so defective as to be demurrable, and the words are alleged by the plaintiff to have been used in a sense which involves the making by the person using them of a criminal charge against the plaintiff, and may have that meaning, the case is brought within the exception contained in clause (a) of s. 9 (1) of the Act respecting Actions of Libel and Slander, R. S. O. c. 57, and the defendant is not entitled to security for costs. That clause is applicable to cases where an innuendo is necessary to give the words complained of a defamatory sense; and upon an application for security there cannot be a trial of the action on the merits in order to determine whether the words used involve a criminal charge.

*H. J. Scott*, Q.C., for the plaintiff.

*E. D. Armour*, Q.C., for the defendant.

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[FERGUSON, J., 16TH FEBRUARY, 1897.]

### *In re* HILL v. HICKS.

*Prohibition—Division Court—Territorial jurisdiction—R. S. O. c. 51, ss. 81, 88, 89—Bailiff.*

Motion by the defendants for prohibition to the 4th Division Court in the united counties of Leeds and Grenville.

The plaint in the Division Court was for trespass in and by the illegal seizure and sale of a mare.

The defendant Thompson recovered judgment against one Olmstead in the 1st Division Court in the county of Carleton, and the defendant Hicks, in his capacity of a bailiff of that Court, seized and sold the mare under execution upon that judgment. The plaintiff claimed the mare, and sued both defendants.

Neither of the defendants resided in the territory of the 4th Division Court of Leeds and Grenville, nor did the cause of action arise therein; but the defendant Hicks, the bailiff, if he had been sued alone, might properly have been sued in that Court under ss. 88 and 89 of the Division Courts Act, R. S. O. c. 51.

*W. H. Blake*, for the motion.

*J. E. Jones*, for the plaintiff, contended that the defendant Hicks was for the purposes of the suit to be considered as resident in the territory of the Court in which the action was brought, and, that being so, the action might properly be brought against both defendants in that Court under s. 81 of the Act.

*Held*, that the words of ss. 88 and 89 could not be so read or strained as to warrant the conclusion that the defendant Hicks was to be considered as resident in the division, when in fact he was not; and prohibition was granted with costs.

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[ROSE, J., 1ST FEBRUARY, 1897.]

### MARTIN v. SAMPSON.

*Costs—Taxation—Defendants severing—Parties—Action to set aside chattel mortgage.*

An appeal by the plaintiff from the ruling of a local taxing officer allowing a separate bill of costs to the defendant Angus, the action having being dismissed against both defendants with costs: 24 A. R. 1, 16 Occ. N. 870.

The action was brought by the assignee for the benefit of the creditors of the defendant Angus to set aside a chattel mortgage

made by that defendant to the defendant Sampson. The defendants appeared and defended by different solicitors.

*Held*, that it was not necessary for the defendants to join in their defences, and the defendant Angus was entitled to a separate bill of costs, the plaintiff having joined him as a party and asked for costs against him; but that his costs should be kept down on taxation, as his interest after a certain stage was only that of a "watching" party.

*Semble*, also, that he was not a necessary party.

*Gibbons v. Darvill*, 12 P. R. 478, distinguished, as being an action brought by a simple contract creditor, and a decision that all parties interested should be parties to the record.

The appeal was dismissed with costs.

*C. D. Scott*, for the plaintiff.

*H. Cassels*, for the defendants.

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## In the First Division Court in the County of Norfolk.

[ROBB, C.C.J., 6TH FEBRUARY, 1897.]

### KITCHEN v. SAVILLE.

*Division Court—Judgment debtor—Commitment—Fraudulent transfer of property—R. S. O. c. 51, s. 240, s.-s. 4 (c)—Conveyance of real estate—Intent—Constitutional law—Intra vires—Rescission of order—Evidence—Pressure—Husband and wife.*

A conveyance of real estate is a "gift, delivery, or transfer of any property," within the meaning of s. 240, s.-s. 4 (c), of the Division Courts Act, R. S. O. c. 51.

Under the sub-section an express wrongful intent need not be shown; it is sufficient to show that the natural consequence of what was done was to defraud creditors.

The sub-section is *intra vires* of the Ontario Legislature.

A Judge in a Division Court who has made an order for the commitment of a judgment debtor has power to vacate it, upon a subsequent application.

An order for the commitment of a judgment debtor who had conveyed real estate to his wife, made upon the evidence afforded by his examination, was vacated upon evidence afterwards produced that she had a claim against him for moneys advanced which she urged in good faith and in respect of which she pressed him for payment or security.



An application by the defendant to vacate an order for his commitment, under the circumstances mentioned in the judgment.

*Wells*, Q.C., for the defendant.

*Slught*, for the plaintiff.

ROBB, C.C.J.—The defendant was examined before me at the last sittings of this Court upon a judgment summons in this suit.

From that examination I was satisfied that the defendant was insolvent and that while in that condition he had conveyed his farm to his wife. He did say that he owed his wife some money, but he did not give that as a reason for making the deed to her, nor did he say anything of any pressure on the part of his wife or of any request from her as leading up to the conveyance. He distinctly stated that his motive in giving the farm to her was in order that she might have some means of support, and the inference I drew, warranted, I think, by the defendant's statement, was that the conveyance to the wife was made to prevent his creditors obtaining payment of their claims by a sale of the farm, and I made an order to commit the defendant under s.-s. 4 (c) of s. 240 of the Division Courts Act, R. S. O. c. 51.

An application was made to me to vacate the order of commitment, or for a re-examination of the defendant, upon an affidavit of the latter setting up that the conveyance to his wife had been executed under pressure from her and in consideration of a large sum of money which he owed her.

Had I been obliged to accept one or other of the accounts given by the defendant, that elicited by a hostile examiner or that prepared by his own solicitor for the purpose of this motion, I think I should have taken the former in preference to the latter, inasmuch as the language in which it was clothed was the defendant's own language, and his answers during that examination were given without any advice as to how they would affect his position. The language of the affidavit, on the other hand, is the language of the draftsman, and it is framed with a direct view of making out a state of facts which he conceives would establish the contention with which he sets out. I do not in this attribute any impropriety to the defendant's solicitor in so framing his affidavits. I apprehend that it is his

duty to make them as strongly in his client's favour as the consciences of the deponents will permit, but I refer to it as an infirmity incident to that kind of evidence as compared with *viva voce* examination. While, however, as between the two statements made by the defendant, I was disposed to attach more importance to the first, I could not fail to be impressed with the idea that the whole truth about this matter had not been elicited, and therefore I suggested that the defendant, his wife, and his son, to whom a chattel mortgage had been given, should attend and be examined before me, apart from each other.

Before dealing with the result of that examination, I will refer to some objections to the order, as originally made, that have been urged on behalf of the defendant, and the objection on behalf of the plaintiff that I have no right to vary or rescind the order to commit.

It is objected that a conveyance of real estate is not within the meaning of s.-s. 4 (c) as being a "gift, delivery, or transfer of any property," one ground being that the alternative "or has removed or concealed the same" could have no application to real estate. This latter contention I think must be conceded; the removal or concealment of real estate would not probably be contemplated by the Legislature, although fixtures that had become attached to the freehold, and in a sense become realty, might be removed or concealed; but I do not think it therefore follows that the "transfer of any property" necessarily means only the transfer of any personal property. In *Kidd v. O'Connor*, 43 U. C. R. 193, it was held that the words "the defendant hath parted with his property or made some secret or fraudulent conveyance thereof" were not limited to real property only, but included personal property also. Harrison, C.J., says, at p. 201: "The enactment is for the suppression of fraud by judgment debtors, and should receive such a liberal interpretation as will best insure the fulfilment of its purpose." Section 8, s.-s. 89, of the Interpretation Act, R. S. O. c. 1, requires that every enactment shall receive such fair, large, and liberal construction and interpretation as will best insure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning, and spirit thereof. " 'Property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every

possible interest which the party can have : " *Jones v. Skinner*, 5 L. J. N. S. Ch. at p. 90. A gift by will of the testator's property will pass everything belonging to him at his death, whether real or personal property : *per* Knight Bruce, L.J., in *Tyrone v. Waterford*, 29 L. J. N. S. Ch. 486. See also *Cameron v. Harper*, 21 S. C. R. 278. I think I should not be justified in holding that the Legislature meant anything less than they have expressly stated by using this word without any limitation or qualification.

Again, it is said that an express wrongful intent must be shown. I think it is sufficient to show that the natural consequence of what was done was to defraud the creditors ; nothing more than this would be required in a criminal case. See Roscoe's Crim. Ev., 11th ed., p. 23.

It was contended that the enactment under which this order was made was *ultra vires* of the Legislature, because s. 868 of the Criminal Code makes it an indictable offence. The two enactments have in view two very different objects. The provision in the Division Courts Act gives the plaintiff a remedy for the private wrong he has suffered from the fraudulent act of the defendant. The code enacts a punishment for that very same act in the public interest. Had the Legislature attempted to do the latter, it might have been *ultra vires*, but the former was entirely within its province.

But it is said that, having made an order to commit, I have no power to vacate it. No authority was cited for this, and I have been unable to find any. On the contrary, the very reverse seems to have been held to be the rule. *Shaw v. Nickerson*, 7 U. C. R. 541, is in point. Robinson, C.J., says at p. 548 : " Mr. Justice Sullivan, sitting in Chambers, must be allowed to have authority, in his discretion, to open again an order which has been granted by himself ; or even to rescind it before it has been carried into effect, upon his discovering that he has made it inadvertently, or that he has been surprised into making it by any perversion or concealment of facts." I have found several other cases to the same effect. The right appears to be inherent in every Court and not to rest upon any legislative provision.

Then with regard to the merits of the application. The evidence given by the defendant's wife is, I think, entitled to great weight, and from it I have come to the conclusion that

she had a legitimate claim, legitimate at least in its inception, against her husband, for payment of which she was urgently pressing ; that, as an alternative, she asked for and insisted upon a conveyance to her of the farm by way of security.

It may be that in an action by Mrs. Saville against her husband for the amount of her claim, if the defences open to the husband were insisted upon, a large part of it at least would probably be disallowed ; but I am not now trying that action ; I am at present concerned only to discover whether the defendant has brought himself within the operation of s.-s. 4 (c), and in a case involving the liberty of the subject, I apprehend everything should be presumed in his favour. I find that his wife had a claim she was urging in good faith and pressing for payment or security, and that he, believing that her claim was well founded, yielded to such pressure, and conveyed to her either as security for her claim and such future advances as she should make, as she contends, or in satisfaction of the claim, as he contends.

I think a conveyance made under such circumstances is not within the sub-section, and the order to commit should be rescinded.

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## NOVA SCOTIA.

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### In the Supreme Court.

[MEAGHER, J., 29TH JANUARY, 1897.]

MACLEAN v. MILLS.

*Parliamentary elections—Petition—Application to substitute petitioner—Affidavit—Condition precedent.*

An application by Edgar Bent under s. 82, s.-s. 2, of the Dominion Controverted Elections Act for an order substituting the applicant as petitioner in respect of a controverted election.

Ross, Q.C., and McInnes, for the applicant.

W. B. A. Ritchie, Q.C., contra.

**MEAGHER, J.**—Section 5 of the Act, as amended by s. 8 of 54 & 55 V. c. 20, requires that when the petition is presented, there shall also be presented therewith an affidavit by the petitioner that he has good reason for believing and does believe that the several allegations contained in the petition are true; and if any elector should thereafter be substituted for the petitioner, then, and in every such case, such elector, before being so substituted, shall make and file an affidavit to the same effect. The petition in this case charges every offence under the statute. The affidavit called for must, in the language of the Act, be made by the elector “before being substituted,” and must state his belief that the allegations in the petition are true, etc. The affidavit of Bent does not comply with the statute in terms or effect. There are allegations in the petition to which his affidavit does not refer. It was contended that the making of the affidavit was not a condition precedent. In my opinion, it is, and the affidavit does not comply with the statute in any sense. The application to substitute will, therefore, be refused.

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### IN CHAMBERS.

[**WEATHERBE, J.**, 19TH JANUARY, 1897.]

### HAMILTON v. STEWICK R. W. CO.

*Discovery—Execution—Examination of former officer of company.*

The plaintiff obtained under Order 40, Rule 44, an order for discovery in aid of execution, with leave to examine the officers of the defendant company. Without any notice to Dickie, who ten years before had been vice-president, an order was obtained to examine him before a Master. Dickie moved to rescind this order.

**WEATHERBE, J.**, held that Dickie, not now being an officer, was not “a person” included in Order 40, Rule 44; that Order 40, Rule 46, did not apply, as this was a judgment for the recovery of money; that Order 35, Rules 4, 5, 6, did not apply, as these referred to taking evidence before judgment.

*McInnes*, for Dickie.

*Cohen*, contra.

[RITCHIE, J., 25TH JANUARY, 1897.]

## BROOKFIELD v. SUTCLIFFE.

*Pleading—Counterclaim—Answer—Reply—Issue—Setting down for trial.*

The defendant pleaded a defence and a counterclaim; the plaintiff replied to both, and immediately moved to set the action down for trial. The defendant objected on the ground that the action was not yet at issue.

RITCHIE, J.—I think the answer or reply to the counterclaim must be treated as a defence to an action, and that the defendant in the suit has the same time to reply to it as the plaintiff would have to reply to a defence in an action in which there was no counterclaim. This case not being on that account yet at issue, I think the motion to set it down for trial premature.

*W. H. Fulton*, for the motion.

*J. A. Chisholm*, contra.

## NEW BRUNSWICK.

In the Supreme Court.

IN CHAMBERS.

[McLEOD, J., 18TH JANUARY, 1897.]

*Ex parte* FLEIGHER.*Habeas corpus—Arrest on Sunday—Depositing money to pay fine—Jurat of a marksman.*

The prisoner, Archibald Fleigher, was convicted and fined \$50 for violating the Canada Temperance Act in Northumberland county, New Brunswick. Soon after his conviction, the prisoner went to the inspector's attorney and deposited with him the sum of \$27 to be held until the balance was paid, and then the whole amount to be forthwith appropriated to the payment

of the fine; but if the balance was not paid within a certain time the deposit of \$27 was to be returned. The balance was not paid, and the prisoner was arrested on a Sunday and lodged in gaol.

Upon application for a *habeas corpus*, a preliminary objection was taken on behalf of the inspector, that the jurat of the affidavit of the prisoner, who was a marksman, was defective and not in compliance with the Rule of Court of H. T. 1848, Earle's Rules, 119. The jurat was as follows:

"Sworn to at Newcastle in the county of Northumberland this 11th day of January, A.D. 1897, by the above named Archibald Fleigher, the same having been first read over and explained to him by me, before me, a commissioner for taking affidavits to be read in the Supreme Court. And I do hereby certify that the said Archibald Fleigher seemed perfectly to understand the foregoing affidavit and wrote his mark thereto in my presence, a commissioner for taking affidavits to be read in the Supreme Court."

*Held*, (1) that, while the form of the jurat was unusual, it was substantially in compliance with the Rule of Court cited; (2) that the deposit of the \$27 with the inspector's attorney was not part payment of the fine; and (3) that an arrest on a Sunday, on a conviction for violating the Canada Temperance Act, because default has been made in the payment of a fine, is bad.

The prisoner was discharged. An order was made exempting the sheriff and gaoler from liability.

*A. I. Trueman*, for the prisoner.

*L. A. Currey*, Q.C., for the inspector.

## MANITOBA.

### In the Queen's Bench.

[FULL COURT, 1ST FEBRUARY, 1897.]

#### KIRCHHOFFER v. CLEMENT.

*Chattel mortgage—Bills of Sale Act, 57 V. c. 1, s. 2—Mortgage for purchase price of seed grain—Form of affidavit of bona fides—Suit against sheriff by third party—Want of proof of judgment—Appeal—Time—Rule 168.*

This was an action brought in the County Court of Brandon, in which the plaintiff claimed damages from the defendant, the sheriff of the Western District, "for the seizure of the plaintiff's goods, that is to say, the crop of grain grown during 1895 upon the south-east half of section 16, township 7, range 18 west, and for that the defendant seized the plaintiff's goods, being the same crop, and converted the same to his own use." The plaintiff's claim was under a chattel mortgage covering the crop in question, which he alleged he took from one Murray, to whom he supplied seed grain. At the trial it was admitted that the crop was seized by the defendant as sheriff, threshed, removed, and sold by him, and that he had notice of the mortgage. The County Court Judge entered a verdict for the plaintiff for \$109, the amount of the mortgage with interest.

From this verdict the defendant appealed, contending that the defendant, seizing under a *fi. fa.*, was not liable to the plaintiff for conversion of the goods sued for, as the chattel mortgage was void and of no effect as against an execution creditor or landlord, on the following grounds:—That the affidavit of *bona fides* at the time it was sworn to was untrue, and did not state that the chattel mortgage was taken to secure the purchase price of seed grain. Further, that the chattel mortgage was not made, executed, or created as a security for the purchase price and interest thereon of seed grain.

By 57 V. c. 1, s. 2, mortgages of growing crops are rendered absolutely void, except the same be made "as a security for the



purchase price and interest thereon of seed grain," and "the affidavit of the mortgagee or his agent shall contain a statement that the same is taken to secure the purchase price of seed grain."

The affidavit made by the plaintiff on the mortgage in this case stated that the mortgagor was indebted to him "in the sum of \$96 mentioned therein for seed grain," and concluded in the usual form, that the mortgage was not made to protect the goods, etc., against creditors, the words being added "but solely for the said seed grain."

The County Court Judge held the affidavit was sufficient, and did not think it was a case where the statement must be in the very language of the Act.

On the opening of the case the plaintiff's counsel took the objection that the appeal was brought too late, judgment having been given on the 8th August, while the affidavit of intention to appeal required by the County Courts Act, 1896, was not filed in the County Court until the 20th August, and the præcipe to have the appeal set down upon the term list was not filed with the prothonotary of the Court of Queen's Bench until the 3rd November.

The defendant's counsel contended that an application should have been made under Rule 168 (b) of the Queen's Bench Act, 1895, to strike the case out of the list, and the objection could not be raised at the hearing.

Clause (d) of Rule 168 provides that all cases appearing upon the list, and not struck off an application, "shall be held conclusively to have been duly and properly entered, and all proper notices in that behalf shall in such case be deemed to have been duly given, and all proper proceedings in that behalf to have been properly taken."

*Held*, that in the face of the Rules, the Court could not, at the hearing, entertain objections to the proceedings and steps leading up to the appeal.

*Held*, also, TAYLOR, C.J., dissenting, that the judgment of the County Court Judge should be affirmed, and the appeal dismissed with costs.

The difference between the statement required by the statute and the one contained in the affidavit seemed to be more formal than material. The grain was supplied to Murray by McCulloch & Co. on the order of the plaintiff; they had become the agents of the plaintiff; and it was really the plaintiff who sold seed grain to Murray. Under such circumstances, it might be truly said that the mortgage was given for the purchase price of seed grain; the variance was only a slight deviation from the prescribed form, not affecting the substance or calculated to mislead; coming within the protection of the statute.

The sheriff seizing under an execution is understood to represent a creditor of the party against whom the execution issued. If a sheriff is sued in trespass for the seizure of goods by the execution debtor, it is sufficient for him to justify the seizure under the writ of execution. But if the suit is brought by a stranger, the sheriff is bound, in order to justify the seizure, to show not only the writ of *fi. fa.*, but also the judgment under which it issued.

In this case the defendant was sued, not by the execution debtor, but by a third party. The plaintiff having established under the chattel mortgage, as between himself and the mortgagor, a good and valid title to the goods seized, the defendant was bound to prove not only the writ of execution, but also the judgment under which it issued. He failed to do so. In the absence of evidence of the judgment, the sheriff was not shown to represent a creditor so as to enable him to claim that the instrument was not operative as against him.

The transaction appearing to be *bona fide*, and the objections so purely technical, the sheriff should be held to strict proof, and on that ground the appeal should be dismissed with costs.

*Per* TAYLOR, C.J.—The appeal should be allowed and a verdict entered for the defendant. The evidence failed to show that the mortgage was given for the purchase price of seed grain. That must mean the price due to the person from whom the seed grain is obtained, and cannot mean money borrowed for the purpose of buying seed grain. The plaintiff had no seed wheat of his own, nor had he any in the hands of McCulloch & Co.; he advanced and lent to the mortgagor the amount needed to pay them for seed grain which Murray obtained from them;

the mortgage was void and did not contain the statement required by the Act.

The goods were not taken from the possession of the plaintiff, and he had not shown anything which could shift the onus to the defendant; the case never went so far as to call upon the defendant to show anything.

*A. D. Cameron and Clark*, for the plaintiff.

*Culver, Q.C., and Hull*, for the defendant.

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[2ND FEBRUARY, 1897.]

### BROWN v. PEACE.

*Husband and wife—Marriage settlement—Covenant by husband to settle subsequently acquired property—Insolvency of husband—Bill of sale from husband to wife executed two years after settlement and after plaintiff had sued.*

Appeal from a County Court, in an interpleader issue.

The plaintiff, having recovered judgment against S. O. Peace for the price of certain furniture sold to him, had an execution issued under which the furniture was seized.

Mrs. Peace, the defendant's wife, claimed the goods as her property under a bill of sale made by her husband to her in pursuance of an ante-nuptial settlement which was executed on 18th October, 1898, on the same day the marriage took place.

It provided that S. O. Peace would forthwith after the marriage convey to his intended wife furniture he then possessed and would within a year purchase other articles until the total value should equal \$1,500.

For nearly two years nothing was done by Peace to convey the furniture to his wife. He admitted that four months after his marriage he was unable to pay his liabilities. On 24th August, 1895, Peace was served with the writ of summons in the action for the price of furniture sold him by the plaintiff; two days later he executed a bill of sale of his furniture to his wife, purporting to do so in pursuance of the ante-nuptial settlement.

The County Court Judge found that there was no immediate delivery followed by an actual and continued change of possession of the goods prior to the giving of the bill of sale; that Peace was then insolvent; that the goods were not exempt from seizure; that the bill of sale was made to protect the goods against other creditors; and that it was void under R. S. M. c. 7, s. 88.

The claimant appealed.

*Held*, that the judgment of the County Court Judge should be affirmed and the appeal dismissed with costs.

The settlement was practically one of all Peace's after-acquired property so as to put the same beyond the reach of his then present and of his future creditors; such a settlement was void as against creditors: *Ex p. Bolland*, L. R. 17 Eq. 115. The contention that Mrs. Peace was since her marriage in actual possession of the goods was rebutted by the fact of the bill of sale being made in August, 1895. Peace had entirely failed to satisfy the onus that rested on him to show that the agreement was *bona fide*, and the bill of sale was not executed and filed until after the plaintiff had commenced his action, nearly two years after the prior agreement.

*Culver*, Q.C., and *Hull*, for the plaintiff.

*Wilson*, for the claimant.

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## IMPERIAL LOAN AND INVESTMENT CO. v. CLEMENT.

### *In re* COULTER.

*Mortgage—Landlord and tenant—Creation of tenancy—Fictitious rent—Want of bona fides—Appeal—Setting down—Præcipe, amendment of.*

This action was brought against the defendant, as sheriff, for taking and removing from the lands of one Coulter, goods seized under execution against Coulter, without satisfying the plaintiffs' claim as Coulter's landlord for rent alleged to have been in arrear.

The land had been mortgaged by Coulter to the plaintiff company, and the mortgage being in arrear and Coulter still in possession, an instrument was drawn up which recited the mortgage, and that by it Coulter "did attorn and become tenant

to the company of the lands at a rental equal to the interest secured by the mortgage, the legal relation of landlord and tenant being thereby constituted between the company and the lessee ;" that default had been made in payment of the sums secured by the mortgage, and the company was entitled to take proceeding to eject the lessee, and by the instrument the company purported to "let" to the lessee the lands, to hold the same until the 1st November, 1895, paying therefor the sum of \$700 "upon the 1st day of January, 1895, being in advance," and the lessee covenanted to pay the rent, and there were other covenants and provisions naturally to be found in such an instrument. The document was executed by Coulter under seal, but not by the company. It bore date the 1st May, 1895, and did not specify when the term was to begin.

The statement of claim set up a tenancy for a term of ten months beginning with the 1st January, 1895, at a rental of \$700, and no other tenancy whatever.

The Judge of the County Court gave judgment for the defendant, on the ground that the rental fixed by the instrument was so much greater than the real value of the land as to show that the transaction was fictitious, and no real demise intended to be created. The plaintiffs appealed.

In the course of the argument the appellants' counsel was proceeding to argue a ground of appeal to which the respondent's counsel objected, because not taken by the præcipe to set the case down, originally filed, but only by an amended præcipe filed more than two months afterwards.

*Held*, that the appellant must be confined to the grounds of appeal set out in the præcipe originally filed. It was not claimed that the amended præcipe was filed by consent, or by leave of the Court or a Judge, under Rule 645. An appellant has no right, without leave, to amend a præcipe once filed, or to substitute a new one. The ground proposed to be urged could not be taken.

*Held*, also, that the appeal should be dismissed with costs. The County Court Judge came to a correct conclusion as to the rent reserved by the lease being excessive ; it was nearly if not quite three times the fair rental value of the farm. Another circumstance also militated against the genuineness of the

lease; the rent was payable in advance on the 1st January, yet the lease bore date the 1st May following, and the tenancy was to continue until the 1st November following. An excessive and unreasonable rent reserved by such a lease as the one in question was conclusive evidence that it was not a *bona fide* transaction; however binding between the actual parties, such an arrangement should be considered void as against the interest of third parties.

*A. D. Cameron and Clark*, for the plaintiffs.

*Culver, Q.C., and Hull*, for the defendant.

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## IMPERIAL LOAN AND INVESTMENT CO. v. CLEMENT.

*In re* MURRAY.

*Mortgage—Landlord and tenant—Creation of tenancy—Bona fides—Pressure on tenant to sign lease.*

This was another action between the same parties and of the same nature as in the preceding case.

The lease was similar in its terms to Coulter's, except that it bore date the 21st December, 1894, and purported to let the land until 1st November, 1895, for a rental of \$705, payable 1st January, 1895.

The evidence in this case showed that the local manager of the plaintiffs had been instructed to sell the property mortgaged, but subsequently he told Murray he would lease to him for \$700; that he asked Murray if he thought he could pay that, and if not, not to take it, and Murray said he could.

Murray, asked if the rent was large, said, "I had to pay it, and it would have been paid if they had left me alone. I had to pay the rent to prevent them closing the mortgage. The farm was worth \$705 to me last year. I expected to pay the \$705 for the use of the farm for the year."

There was no evidence that the company had notice of Murray's difficulties.

KILLAM, J., stated that upon this evidence he should find that Murray was *bona fide* threatened with eviction and with loss

of his farm, unless he should accept the position of tenant for a year at a rental of \$705, and that under this pressure he agreed to do so. It was true that the rental was grossly in excess of what another tenant would have been willing to pay, and very likely, even if Murray confidently expected to realize the amount from the land, he was over sanguine. But the mere amount of the rental was insufficient, under the circumstances, to show that the company did not *bona fide* intend to make a lease and Murray to accept the position of tenant at the rental, and this also, notwithstanding that the term granted was somewhat less than a year, and the rent payable early in the term.

The judgment in the County Court should be reversed and a judgment entered for the plaintiffs for the agreed damages, \$250, with costs of appeal and of the action.

TAYLOR, C.J., and DUBUC, J., held the case must be governed by their decision in *Coulter's* case. The circumstances attending the making of the lease might not raise the same suspicions as in that case, but the rent reserved was grossly higher than the fair rental value of the farm. It was merely a device intended to give the company an advantage which they would not otherwise have had.

Appeal dismissed with costs.

*A. D. Cameron and Clark*, for the plaintiffs.

*Culver, Q.C., and Hull*, for the defendants.

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## NORTH-WEST TERRITORIES

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In the Supreme Court.NORTHERN ALBERTA JUDICIAL  
DISTRICT.

[ROULEAU, J., 12TH JANUARY, 1897.]

O'BRIEN v. JOHNSTON.

*Promissory note—Equitable set-off—Counterclaim—Trusts and trustees.*

Action on a promissory note for \$8,004.05 made by the defendant in favour of one Maloney, who indorsed it before maturity to Lougheed and Ewart, who in turn indorsed it to the plaintiff.

The defendant paid \$1,604 into Court, and as to the residue claimed pleaded that Lougheed and Ewart held the note as security for \$869 only, and the balance in trust for Maloney; that the plaintiff held the note upon the same trusts as Lougheed and Ewart; that Maloney was indebted to the defendant in various sums, for which he claimed a set-off; that at the time of the maturity of the note, Maloney, being in insolvent circumstances and unable to pay his debts in full, and conniving with the plaintiff and Lougheed and Ewart to defeat the defendant and other creditors of Maloney, purported to execute a deed of assignment of his interest in the note, in trust to pay Lougheed and Ewart \$200 for legal services, and also to pay the claims of several other persons named, but the defendant claimed that this deed of assignment was preferential, fraudulent, and void, and that it should be set aside.

*Held*, upon objection by the plaintiff, that the defences were bad in law; there could be no set-off, legal, statutory, or equitable, as against the plaintiff; and the defendant's remedy, if any, was by counterclaim.

*C. C. McCaul*, Q.C., for the plaintiff.

*P. McCarthy*, Q.C., for the defendant.



## IN CHAMBERS.

[ROULEAU, J., 12TH JANUARY, 1897.]

## LOUGHEED v. MURRAY.

*Husband and wife—Separate estate of wife—Legacy—Domicil—Advance to husband—Bill of sale—Interpleader.*

Summary trial of interpleader issue by consent upon affidavits and cross-examination thereon.

The sheriff seized under the plaintiffs' execution goods in the possession of the defendant, which were claimed by his wife under a bill of sale.

The execution debtor and the claimant were married in 1878 in England, where they had their domicil. The debtor was a non-commissioned officer in the army. In 1888 he went with his regiment, accompanied by his wife, to Bermuda, and in 1886 to Halifax, where he and his wife remained until 1888. In April of that year he retired from the service with a pension and went to the North-West Territories, with his wife and family, to reside there. In April, 1886, the wife's father died in England, and left her £400, which was brought to her at Halifax in March, 1888. Between April, 1888, and November, 1895, she advanced to her husband out of that money \$1,500, for which she got from him the bill of sale under which she claimed.

*Held*, that the £400 vested in the claimant as her separate property in 1886, and, being such in England, where her domicil then was, notwithstanding her temporary residence abroad, it continued to be such in the North-West Territories; and the money paid thereout to her husband was a valid consideration for the bill of sale.

Bishop on the Law of Married Women, vol. 2, s. 565, and *Conger v. Kennedy*, 16 Occ. N. 278, 26 S. C. R. 897, referred to.

*C. C. McCaul*, Q.C., for the claimant.

*P. McCarthy*, Q.C., for the plaintiffs.

**SOUTHERN ALBERTA JUDICIAL  
DISTRICT.****IN CHAMBERS.****[ROULEAU, J., 12TH FEBRUARY, 1897.]****BECKER v. RUTHERFORD.**

*Action—Dismissal of—Abuse of process of Court—Recovery of debt from next  
of kin of deceased debtor.*

W. R. died in Scotland, leaving a widow and children in the North-West Territories. Four days after his death, and before any application for probate or letters of administration, the plaintiff, claiming to be a creditor of the deceased, began this action against the widow and children to recover his debt, alleging the existence of property of the deceased within the jurisdiction sufficient to answer his claim.

*Held*, upon the application of the defendants to dismiss the action, that the statement of claim disclosed no reasonable cause of action; that the action was frivolous and vexatious and an abuse of the process of the Court; and an order was made, under s. 158 of the Judicature Ordinance, dismissing it with costs.

*Muir, Q.C., for the defendants.*

*A. L. Sifton, for the plaintiff.*

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## Supreme Court of Canada.

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QUEBEC.]

[25TH JANUARY, 1897.]

### SALVAS v. VASSAL.

*Deed absolute in form—Proviso for redemption—Effect of, as to execution creditors of grantor—Pledge—Vente à réméré.*

Real estate was conveyed to S. by notarial deed, absolute in form, but containing a provision that the vendor should have the right to a re-conveyance on paying to S. the amount of the purchase money within a certain time. S. subsequently advanced the vendor a further amount, and extended the time for redemption. The vendor did not pay the amount within the time, and, the property having been seized under execution issued by V., a judgment creditor of the vendor, S. filed an opposition claiming it under the deed.

*Held*, reversing the judgment of the Court of Queen's Bench, that the sale to S. was *vente à réméré*, and was not, when the rights of third parties were in question, to be treated as a pledge and set aside on proof that the vendor was insolvent when it was executed.

*Pacaud v. Huston*, 8 Q. L. R. 214, overruled.

*Geoffrion*, Q.C., and *Lavergne*, for the appellant.

*Crépeau*, Q.C., and *Beaudin*, Q.C., for the respondent.

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### MURPHY v. LABBÉ.

*Landlord and tenant—Use of premises—Destruction by fire—Negligence—Evidence—Burden of proof—Art. 1629, C.C.*

Premises were leased to be used as a furniture factory, the lease containing the usual covenants as to repair. The premises

were destroyed by a fire, of which it proved impossible to discover the origin. In one of the rooms there was a quantity of cotton waste saturated with oil, but nothing to connect it with the fire. In an action by the lessor for the restoration of the premises or equivalent damages :—

*Held*, STRONG, C.J., dissenting, that there was no obligation on the lessee, by virtue of Art. 1629, C. C., to excuse himself from liability by proving that the fire occurred from causes beyond his control ; that negligence must be established against him as in other cases of the kind ; that he was not liable if he proved that he had used the premises in the manner a prudent owner would use them ; and that the presence of the saturated cotton waste was, of itself, no evidence of negligence.

*Held*, also, that the evidence of workmen of the lessee should not be discredited because they might possibly have feared convicting themselves of imprudent acts.

Judgment of Court below affirmed.

*Beique*, Q.C., and *Trenholme*, Q.C., for the appellant.

*Lafleur* and *Fortin*, for the respondent.

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### CITY OF QUEBEC v. NORTH SHORE R. W. CO.

*Deed—Construction of—Ambiguous expressions—Conduct of parties—Presumptions.*

On the 21st August, 1882, the Government of Quebec acquired by deed from the corporation of the city of Quebec all the proprietary rights that the city had in lands designated on the cadastre as No. 1937, “situated between St. Paul, St. Roch, and Henderson streets and the river St. Charles, with the wharves and buildings thereon erected,” concerning which there had previously been negotiations and some correspondence between the Government and the city. The deed, however, did not follow precisely the designations or terms referred to in the correspondence. On the same day, by another deed, the Government conveyed the same property to the respondents, and subsequently the property passed to the Canadian Pacific Railway Company under the provisions of 47 V. c. 87, s. 8 (D.), and

48 & 49 V. c. 58, s. 8 (D.) Upon the execution of the deeds mentioned, the respondents took possession of the grounds and wharves, which had been occupied firstly by the respondents and then by the Canadian Pacific Railway Company ever since that time. In August, 1894, the respondents brought an action to recover part of the lands alleged by them to have been included in the description contained in the deed, which lands had not been delivered to them, but had remained in the possession and occupation of the city and others to whom the city had sold the same. The difficulty arose from the ambiguity in the description, arising from the fact that "Henderson" street did not run to the river, but only to a public highway known as "Orleans Place," the limits of which were not in direct prolongation of Henderson street as actually used for a thoroughfare. The respondents claimed that from the correspondence pending the negotiations it appeared that the intention of the parties to the deed was that the boundary should be by Henderson street and the line of the western limit of that street, as then in use, prolonged into the river St. Charles, which would entitle them to an additional strip of land and a wharf commonly called the "Gas Wharf," of which they had been improperly deprived during a period of over twelve years, through unlawful occupation by the city and those to whom the city sold the property after having conveyed it to the Government by that description.

*Held*, that, in the absence of other means of ascertaining the intention of the parties, ambiguities in the designation of lands should be interpreted against the vendee and in favour of the vendor and his assigns.

In cases of ambiguous descriptions in deeds of lands, the manner in which the parties to the deed have occupied and dealt with property which might be affected thereby is strong proof of the boundaries of the lands intended to be conveyed, and sufficient in law to justify the presumption that the parties by their subsequent occupations correctly executed their intentions at the time of the passing of the deed.

*Held, per* Gwynne, J., that whatever, if any, right, title, or interest in the disputed portion of the lands did pass by the first deed to the Quebec Government, had become vested in the Canadian Pacific Railway Company by virtue of the statutes and instruments executed thereunder, and consequently the

respondents had no right of action whatever to have it declared that they had any right, title, interest, or claim thereto.

*C. A. Pelletier*, Q.C., for the appellant.

*F. Langelier*, Q.C., for the respondent.

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KEARNEY v. LETELLIER.

*Sale of goods—Sample sale—Dispute as to price—Delivery of invoice—Presumption—Evidence.*

L. agreed to buy from K. a job lot of tea of which he had samples. Before the tea was delivered L. received an invoice charging a uniform rate per pound for the lot. Some five months afterwards he was asked to accept a draft for the balance claimed on the sale, having accepted for part of the price before, but refused on the ground that the amount was too large, alleging for the first time that the sale was according to the prices marked on the respective samples, and not one rate for the lot. In an action to compel acceptance, or in default for payment of the amount, K. swore to the uniform rate and L. to the rate per sample, the latter supporting his evidence by that of his son, who testified that K. first applied to him to buy the tea at the sample prices, and was referred to his father, and by that of a broker present when the bargain was made, who was very vague in his recollection of the actual terms. The Superior Court gave judgment in favour of K., which was reversed by the Court of Queen's Bench.

*Held*, reversing the decision of the Queen's Bench, GWYNNE, J., dissenting, that the receipt of the invoice by L., and its retention without objection for five months, raised a presumption that the price therein stated was that agreed upon, and that L. had not produced the clear and absolute evidence necessary to rebut such presumption.

*Held*, per GWYNNE, J., that in this case no such presumption was raised by the retention of the invoice.

*Fitzpatrick*, Q.C., for the appellant.

*Languedoc*, Q.C., and *Dorion*, for the respondent.

BRITISH COLUMBIA.]

ADAMS v. McBEATH.

*Will—Testamentary capacity—Undue influence—Instrument drawn on instructions from legatee—Suspicious circumstances—Evidence—Burden of proof.*

A. brought an action in the Supreme Court of British Columbia to set aside the will of his uncle in favour of M., a stranger in blood to the testator, alleging that its execution was obtained by undue influence of M. at a time when the testator was mentally incapable of knowing what he was doing. The evidence at the trial showed that A. and the testator corresponded at intervals between 1878 and 1891, and the earlier letters of the latter expressed his clear intention to leave his property to A., while in the latter that intention seemed to be modified, if not abandoned.

The circumstances attending the testator's last illness and the execution of his will were as follows. He was 84 years old, and lived entirely alone. A neighbour, not having seen him go out for two or three days, notified one of his friends, who got into the house, and found him lying on the floor, where he had fallen in a fit, and lain for three days. He sent for a doctor, and meanwhile did what he could himself to aid him. When the doctor came he pronounced the testator to be nearing his end, and M., who was notified or heard of the matter, came and had him conveyed to his own house. The next day M., according to his own testimony, at the testator's request, went to a solicitor, whom he instructed to draw a will for the testator in his, M.'s, favour. The solicitor prepared the will, brought it to the house where the testator was, read it over to him, and asked him if he understood it, and, having answered that he did, the testator executed the will, which the solicitor and M.'s brother-in-law witnessed. M. was present all the time the solicitor was in the house. The doctor who attended the testator swore at the trial that he was, though very weak and low, mentally capable of attending to business, and of understanding what was said to him. It was proved also that a short time before his seizure he had had drafted a will in favour of A., his nephew, but did not execute it. He died a week after executing the will attacked in the action.

*Held*, affirming the judgment of the Supreme Court of British Columbia, 3 Brit. Col. L. R. 518, that it was not sufficient for A. to prove merely circumstances attending the execution of the will consistent with the hypothesis that it might have been obtained by undue influence; they must be inconsistent with a contrary hypothesis; and what was proved in this case did not fulfil this condition.

GWYNNE, J., dissenting, held that the facts proved were sufficient to justify the Court in setting aside the will.

*Moss*, Q.C., for the appellant.

*S. H. Blake*, Q.C., for the respondent.

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## ONTARIO.

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### Supreme Court of Judicature.

### COURT OF APPEAL.

DIVISIONAL COURT.]

[2ND MARCH, 1897.

### ROSE v. McLEAN PUBLISHING COMPANY.

*Trade-name—Geographical designation—“The Canadian Bookseller and Library Journal” — “The Canada Bookseller and Stationer” — Injunction.*

The use of a geographical name in a secondary sense as part of the title identifying a mercantile journal, and not as merely descriptive of the place where the journal is published, will be protected.

The use of the name “The Canada Bookseller and Stationer” was restrained as conflicting with the name “The Canadian Bookseller and Library Journal.”

Judgment of a Divisional Court, 27 O. R. 325, 16 Oca. N. 118, reversed; MACLENNAN, J.A., dissenting.

*Kappele* and *J. Bicknell*, for the appellants.

*Robinson*, Q.C., and *LeVesconte*, for the respondents.



# ALDRICH v. CANADA PERMANENT LOAN AND SAVINGS COMPANY.

*Mortgage—Power of sale—Improvident exercise of—Negligence—Sale of two lots in one parcel—Damages.*

A mortgagee who sells in one parcel a farm and a shop in a village nearly three-quarters of a mile away, not in any way used together, is liable for the difference between the amount realized and the amount that would have been realized had the farm and shop been sold separately.

Judgment of a Divisional Court, 27 O. R. 548, 16 Occ. N. 247, affirmed; BURTON, J.A., dissenting.

*W. Cassels, Q.C., and G. A. Mackenzie, for the appellants.*

*Charles Macdonald, for the respondent.*

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Boyd, C.]

# VAN TASSELL v. FREDERICK.

*Will—Construction—Devise—Estate—Defeasible fee—"Die without issue"—Share.*

An appeal by the plaintiff from the judgment of Boyd, C., 27 O. R. 646, 16 Occ. N. 318, was dismissed with costs; MACLENNAN, J.A., dissenting; the majority of the Court agreeing with the judgment appealed from.

*Moss, Q.C., for the appellant.*

*E. D. Armour, Q.C., and F. E. O'Flynn, for the respondents.*

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[11TH MARCH, 1897.]

# ELLIS v. TOWN OF TORONTO JUNCTION.

*Municipal corporations—Police magistrate—Salary—Reduction of—R. S. O. c. 72, ss. 5, 28.*

An appeal by the plaintiff from the judgment of Boyd, C., 28 O. R. 55, 16 Occ. N. 878, was dismissed with costs at the con-

clusion of the argument, the Court agreeing with the reasoning of the judgment appealed from.

*Raney*, for the appellant.

*Going*, for the respondents.

ARMOUR, C.J.]

[1ST MARCH, 1897.

### BOWIE v. GILMOUR.

*Contract — Illegality — Sale of liquor to unlicensed dealer — Illegal object of sale.*

Action to recover price of ale sold to the defendant, a dealer in liquor, by the plaintiffs, who were duly licensed brewers. After the order was booked, and at the same interview, the plaintiffs were informed by the purchasing agent of the defendant that the defendant had no license to sell. The defendant pleaded that the ale was supplied to her for the purpose of its being sold by her in contravention of the Ontario Liquor License Act.

*Held*, that the delivery of the ale having taken place with the knowledge of the illegal purpose to which the defendant intended to apply it, and having been made for the purpose of enabling her to carry out that object, the plaintiffs could not recover.

Judgment of ARMOUR, C.J., reversed.

*Moss*, Q.C., and *MacTavish*, Q.C., for the appellant.

*Buell*, for the respondents.

MEREDITH, C.J.]

[2ND MARCH, 1897.

### HALSTEAD v. BANK OF HAMILTON.

*Banks and banking—Bank Act, 53 V. c. 31, ss. 74, 75—Security—Form C. —“Negotiating” — Bankruptcy and insolvency — Assignments and preferences.*

An appeal by the defendants from the judgment of MEREDITH, C.J., 27 O. R. 485, 16 Occ. N. 221, was dismissed with

costs, the Court holding that the case was governed by *Bank of Hamilton v. Shepherd*, 21 A. R. 156, 14 Occ. N. 250.

*J. J. Scott*, for the appellants.

*Gibbons*, Q.C., for the respondent.

FERGUSON, J.]

### NOVERRE v. CITY OF TORONTO.

*Municipal corporations—Negligence—Way—Opening—Invitation—Accident—Land adjoining highway.*

An appeal by the plaintiff from the judgment of FERGUSON, J., 27 O. R. 651, 16 Occ. N. 818, was dismissed with costs, the Court agreeing with the judgment below.

*Laidlaw*, Q.C., and *J. Bicknell*, for the appellant.

*Fullerton*, Q.C., and *W. C. Chisholm*, for the respondents.

ROSE, J.]

### ATTORNEY-GENERAL v. HAMILTON STREET RAILWAY COMPANY.

*Sunday—Street railways—Lord's Day Act, R. S. O. c. 203, s. 1—Construction.*

A company incorporated for the purpose of operating street cars does not come within the Lord's Day Act, R. S. O. c. 203, s. 1.

Judgment of ROSE, J., 27 O. R. 49, 16 Occ. N. 7, affirmed.

*Moss*, Q.C., and *A. E. O'Meara*, for the appellant.

*F. Martin*, Q.C., and *D'Arcy Martin*, for the respondents.

ROBERTSON, J.]

### CAMPBELL v. MORRISON.

*Indemnity—Mortgage—Purchase subject to mortgage—Assignment of right to payment.*

The equitable obligation of a purchaser of land subject to a mortgage may be assigned by the vendor to the mortgagee, who may maintain an action thereon against the purchaser for recovery of the mortgage moneys.

Judgment of ROBERTSON, J., affirmed; BURTON, J.A., dissenting.

*Moss, Q.C., and Boland, for the appellant.*

*J. M. Clark, for the respondent.*

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FALCONBRIDGE, J.]

DOYLE v. NAGLE.

*Will—Construction—Falsa demonstratio—Lot described by wrong number.*

A testator, who was the owner of the south-west quarter of lot 12 in the 4th concession and of lot 12 in the 5th concession of a township, and of no other real estate, after providing for payment of his debts and funeral expenses by his executors, declared that "the residue of my estate which shall not be required for such purpose, I give, devise, and bequeath as follows," and then devised "the south-westerly quarter of lot 11, concession 4," to one son, and lot 12 in the 5th concession to another.

*Held*, that the word "eleven" might be rejected as *falsa demonstratio* and the devise read as if it were "the residue of my real estate in the fourth concession."

*Doe Lowry v. Grant*, 7 U. C. R. 125, applied and considered.

Judgment of FALCONBRIDGE, J., affirmed.

*M. Scanlon and D. Ross, for the appellants.*

*J. Hood, for the respondent.*

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TRUSTS CORPORATION OF ONTARIO v. RIDER.

*Chose in action—Parol assignment of—R. S. O. c. 122, s. 7.*

A parol assignment of a chose in action is valid.

Judgment of FALCONBRIDGE, J., 27 O. R. 593, 16 Oco. N. 264, affirmed.

*F. A. Anglin, for the appellants.*

*D. Urquhart, for the respondent.*

STREET, J.]

BLAKELEY v. GOULD.

*Bankruptcy and insolvency—Assignments and preferences—Transfer of unearned profits.*

An assignment by way of security of the profits expected to be made out of a contract to do work does not come within the Act respecting Assignments and Preferences, and cannot be set aside under that Act.

Judgment of STREET, J., affirmed.

Robinson, Q.C., and W. N. Ferguson, for the appellant.

W. N. Miller, Q.C., for the respondent Gould.

Aylesworth, Q.C., for the respondent Robertson.

Worrell, Q.C., for the respondents the Bank of Montreal.

WASHINGTON v. GRAND TRUNK RAILWAY COMPANY  
OF CANADA.

*Railways—Negligence—Packing of railway frogs—Workmen's Compensation Act, 55 V. c. 80, s. 5, s.-ss. 2, 3 (O.)—Statutes—Construction—Division into sections—51 V. c. 29, s. 262, s.-ss. 3, 4 (D.)*

Sub-section 3 of s. 262 of the Railway Act, 51 V. c. 29 (D.), provides that the spaces behind and in front of every railway frog shall be filled with packing. Sub-section 4 of the same section provides that the spaces between any wing-rail and any railway frog, and between any guard-rail and track-rail, shall be filled with packing, and this sub-section ends with a proviso that the Railway Committee may allow "such filling" to be left out during the winter months.

*Held*, that this proviso applied to both sub-sections, and that permission having been given by the Railway Committee to frogs being left unpacked, the defendants were not liable for an accident resulting from that cause.

The provisions of s.-ss. 2 and 3 of s. 5 of the Workmen's Compensation for Injuries Act, 55 V. c. 80 (O.), as to packing railway frogs, are not binding upon railways under the legislative control of the Dominion.

Judgment of STREET, J., reversed.

*McCarthy*, Q.C., for the appellants.

*Lynch-Staunton*, for the respondent.

## HIGH COURT OF JUSTICE.

[ARMOUR, O.J., FALCONBRIDGE, J., STREET, J., 9TH FEBRUARY, 1897.]

### REGINA v. MACHEKEQUONABE.

*Criminal law—Pagan Indian—Manslaughter—Evil spirit.*

A pagan Indian, who believed in an evil spirit in human shape called a "Wendigo," shot and killed another Indian under the impression that he was the Wendigo.

*Held*, that he was properly convicted of manslaughter.

*J. R. Cartwright*, Q.C., for the Crown.

*J. K. Kerr*, Q.C., for the prisoner.

[17TH FEBRUARY, 1897.]

### MOORE v. GILLIES.

*Landlord and tenant—Overholding Tenants' Act—Dispute as to nature of tenancy—Colour of right—Jurisdiction—R. S. O. c. 144—58 V. c. 13, s. 23.*

*Held*, that since the amendment of the Overholding Tenants' Act, R. S. O. c. 144, by 58 V. c. 13, s. 23, by striking out of the Act the words "without colour of right," the Judge of the County Court is to try the right and find whether the tenant wrongfully holds.

And so in this action, where the dispute was in reference to the tenancy, the landlord claiming it to be a monthly holding, and the tenant a yearly tenancy :—

*Held*, that the County Court Judge had jurisdiction.

*McKechnie*, for the tenant.

*Justin*, for the landlord.

[MEREDITH, C.J., 25TH FEBRUARY, 1897.]

*In re* MACKENZIE TRUSTS.

*Trusts and trustees—Investment of trust fund—Request of settlor—Defective execution of power—Infants—Duty of official guardian.*

By the terms of a settlement made by the mother of certain infants for their benefit, the trust fund was to be invested in Dominion, Provincial, or municipal bonds or debentures, or first mortgages upon real estate. The settlement contained a power of revocation and alteration of the trusts by the settlor, with the consent of the trustee. In pursuance of a written request signed by the settlor and addressed to the trustee, the latter invested a part of the fund in the purchase of shares of a certain savings company.

*Held*, that, although it was not an investment authorized by the settlement, the written request operated as a defective execution of the power, and should be aided in favour of the trustee; and therefore a local Master, in passing the trustee's accounts, properly credited him with the amount paid for the shares.

*Chapman v. Gibson*, 3 Bro. C. C. 229, *In re Mackenzie Trusts*, 23 Ch. D. 750, *In re Tennant*, 40 Ch. D. 895, *In re Mundy*, [1891] 1 Ch. 899, *Carver v. Richards*, 27 Beav. 488, referred to.

*Held*, also, that the official guardian was right in requiring that the view of the local Master should be supported by that of a Judge before being given effect to.

*J. Hoskin*, Q.C., official guardian.

*Moss*, Q.C., for the trustee.

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[FERGUSON, J., 5TH MARCH, 1897.]

FISHER & CO. v. LINTON.

*Partnership—Individual debt partner—Payment out of partnership funds—Authority—Action—Rule 317.*

The defendants were indebted to the plaintiffs' firm, consisting of two partners, and one partner was individually indebted to the defendants. This partner wrote two letters to the de-

defendants, one over his own signature and the other over the firm name, stating that he had paid certain sums due by him to the defendants by giving the defendants credit in the books of his firm. This was done without the authority of the other partner, but the entries were actually made in the books of the firm, to which the other partner had access, though he did not in fact know of the entries until after the firm had been dissolved. Accounts were afterwards rendered to the defendants without any claim being made in respect of the sums credited. This action was brought after the dissolution, in the name of the firm, for the price of goods sold.

*Held*, that the defendants were not entitled to credit for the sums referred to.

*Leverson v. Lane*, 13 C. B. N. S. at p. 285, *In re Riches*, 4 DeG. J. & S. at p. 585, and *Kendal v. Wood*, L. R. 6 Ex. 243, applied and followed.

*Held*, also, that Rule 317 authorized the bringing and sustaining of the action in the name of the partnership existing at the time the goods were furnished to the defendants.

*W. A. J. Bell*, for the plaintiffs.

*Gibbons, Q.C.*, for the defendants.

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[FALCONBRIDGE, J., 6TH FEBRUARY, 1897.]

### REGINA *ex rel.* PILON v. LALONDE.

*Municipal elections—Quo warranto—Hearing before Judge at local Weekly Court—Jurisdiction—Convenience.*

Motion under the Municipal Act in the nature of a *quo warranto* complaining of the undue election and usurpation of the offices of councillors for the incorporated village of Casselman by David Lalonde and Gilbert Lafèche.

The motion came on for hearing at the Ottawa Weekly Court on the 2nd February, 1897.

*M. G. Gorman*, for the respondent Lalonde, objected to the jurisdiction of the Judge.

*Belcourt*, for the relator, contra.



FALCONBRIDGE, J.—I am of the opinion that, apart from the provisions of s. 95 of the Judicature Act, 1895, I have jurisdiction and am bound to hear and determine this matter.

The relator obtained from Mr. Justice MacMahon an order, on reading the notice of motion herein, the affidavit filed, and the recognizance of the relator and his sureties, the same being allowed as sufficient, that the relator should be at liberty to serve the said notice of motion on Lalonde and Lafèche. The notice of motion was accordingly served, being made returnable before the presiding Judge at the Weekly Sittings at the Court House in Ottawa on Tuesday the 2nd instant.

There was a presiding Judge on the day and at the place named, hearing other business which had been set down for that day. The relator could have gone to the Master in Chambers, but the statute, s. 187 of the Consolidated Municipal Act of 1892, gives him the right to have his case tried by a Judge of the High Court, and a Judge being found at the place and on the day named, that Judge is, I think, properly seized of the case. *Ubi judex, ibi curia.*

The convenience of this procedure is obvious.

*Objection overruled.*

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[MACMAHON, J., 9TH FEBRUARY, 1897.]

### BUNNELL v. SHILLING.

*Life insurance—Policy—Change of beneficiary—Vested interest—Foreign contract—Foreign law.*

By a contract between the insured and her husband, in consideration of his agreeing not to apportion amongst his children any part of the moneys to arise from an insurance policy upon his life, of which she was the named beneficiary, she agreed that a policy to be issued upon her life should be made payable to him as beneficiary. This agreement was carried out, and the husband for five years paid the premiums upon his wife's policy.

*Held*, that a vested interest in the policy passed to him, and the beneficiary could not be changed without his consent, even where the policy had lapsed and a new policy been issued in lieu of it, by agreement between the insurers and the insured.

*Held*, also, that although the application for insurance was made and the policy delivered in Ontario, the insured and the insurers having agreed that the place of contract should be in New York, and that the contract should be construed according to the law of that state, if the change in the beneficiary was validly made according to the law of that state, the husband was not entitled to the insurance moneys, notwithstanding that the insurers had not intervened and were raising no question as to whether the law of Ontario or that of New York should govern; but, applying the law of New York, that the change was not validly made.

*Watson*, Q.C., and *Latchford*, for the plaintiff.

*Wyld*, for the defendants.

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[STREET, J., 23RD JANUARY, 1897.]

*In re* CURRY, CURRY v. CURRY.

*Account—Master's office—Verification—Affidavit—Vouchers—Cross-examination—Notice—Re-opening account.*

The person bringing into the Master's office an account, verified by affidavit, is obliged to vouch the payment of the amounts included in it, and is liable to cross-examination upon his affidavit, notice being first given him of the items upon which it is proposed that he shall be cross-examined.

Where no such notice was given, the executor was not cross-examined, although ample opportunity was offered for the purpose, and the accounts were in no way objected to until the reference had been closed so far as the evidence was concerned, the Master properly considered that the affidavit verifying the accounts under Rule 68 and the vouchers had sufficiently proved the accounts.

*Wormsley v. Sturt*, 22 Beav. 398; *Re Lord*, L. R. 2 Eq. 605; *McArthur v. Dudgeon*, L. R. 15 Eq. 102; *Meacham v. Cooper*, L. R. 16 Eq. 102; *Bates v. Eley*, 1 Ch. D. 473, followed.

Upon an application to re-open an account of \$55,129.54, comprised in upwards of 1,600 items of disbursements, one or

two items were pointed out as appearing *prima facie* to be of such a character as might have been objected to.

*Held*, not sufficient to justify opening up the whole account, especially in view of the other facts of the case.

*McCarthy*, Q.C., and *O. E. Fleming*, for the appellants.

*S. H. Blake*, Q.C., and *R. F. Sutherland*, for the respondents.

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### IN CHAMBERS.

[MEREDITH, C.J., 26TH FEBRUARY, 1897.]

#### *In re* SOLICITORS.

*Solicitor—Agreement with client—Construction—Taxation of costs—Solicitors' fees—Counsel fees.*

An appeal by the solicitors from the report of the local registrar at St. Thomas upon taxation of the solicitors' bill of costs of an action, at the instance of their client. The solicitors had agreed with the client that they would not charge him "solicitors' fees," but only disbursements. At the trial of the action one of the solicitors, being also a barrister, acted as counsel, and another barrister, not one of the firm, appeared as second counsel, but took no part in the trial. There was no affidavit that the second counsel had been paid a fee by the solicitors. The local officer refused to tax any counsel fee.

*J. M. Clark*, for the solicitors, contended that counsel fees were not covered by the words "solicitors' fees," and were properly taxable, notwithstanding the agreement.

*Defries*, for the client, was not called upon.

MEREDITH, C.J., held that the agreement must be construed as the client naturally understood it, *i.e.*, not making any technical distinction between solicitors' fees and fees of counsel; and dismissed the appeal with costs.

[FERGUSON, J., 3RD MARCH, 1897.]

**HOGABOOM v. MACCULLOCH.**

*Amendment—Statement of claim—Writ of summons—Service out of jurisdiction—Adding new claim—Limitation of actions—Terms.*

Where a writ of summons in an action for a specified cause has been issued and served upon defendants out of the jurisdiction with a statement of claim, pursuant to an order under Rule 271 (1809), and the defendants have appeared, an order may properly be made allowing the plaintiffs to amend the statement of claim by adding a new claim for an entirely different cause of action, provided that it is a claim in respect of which leave to serve process out of the jurisdiction might have been obtained.

*Holland v. Leslie*, [1894] 2 Q. B. 346, 450, followed.

*Held*, also, that the plaintiffs should, in respect of the Statute of Limitations running against their added claim, be placed in the same position as if their action for the added claim had been brought at the date of the amendment.

*W. N. Ferguson*, for the plaintiffs.

*N. F. Davidson*, for the defendants.

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**NOVA SCOTIA.**


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**In the Supreme Court.**

**IN CHAMBERS.**

[WEATHERBE, J., 5TH FEBRUARY, 1897.]

**REGINA v. SEARS.**

*Summary conviction—Indictable offence—Warrant of commitment—Consent of prisoner to be tried summarily—Failure to show—Discharge of prisoner.*

The defendant was convicted before the stipendiary magistrate for the town of Barrsborough for assaulting a police con-

stable, contrary to s. 268 (b) of the Criminal Code, having elected to be tried summarily under Part LV. of the Code, and was sentenced to imprisonment for a period of six months with hard labour. The warrant under which he was committed recited that the defendant was "duly convicted," etc., of the offence charged, but it did not show on its face that the prisoner gave the consent for summary trial when he was before the magistrate, which under s. 786 is a condition precedent to the magistrate exercising the jurisdiction under which the conviction was made.

A writ of *habeas corpus* having issued, the gaoler returned a copy of the warrant as above described as his justification for detaining the prisoner, and a motion being made for his discharge:—

*Held*, that the warrant was bad for not having shown or recited on its face the consent of the prisoner to be tried summarily under Part LV. of the Criminal Code, and the prisoner must be discharged as being wrongly in custody. Usual order made protecting the magistrate and all concerned in the defendant's imprisonment.

*W. H. Fulton*, for the prisoner.

*W. B. A. Ritchie*, Q.C., for the informant and magistrate.

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## NEW BRUNSWICK.

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'In the Supreme Court.

IN EQUITY.

[BARKER, J., 16TH FEBRUARY, 1897.]

GUNTER v. WILLIAMS.

*Life insurance—Loss payable to assured's wife—Assignment without her consent.*

An insurance policy on his life was effected by A. in 1887, payable to his wife, the plaintiff. In 1892, A., being indebted to the defendants, in consideration of the debt and of further

accommodation, assigned the policy and the loss to them, and the plaintiff joined in the assignment. Upon A.'s death in January, 1896, the present suit was brought to have the assignment set aside as having been procured from the plaintiff by fraudulent representation, and to have the loss declared payable to her. The Court found that no fraud had been practised, but

*Held*, that even if there was evidence of fraud, the suit must fail, as the assignment being made before the Act of 1895, 58 V. c. 25, it did not apply, and that the insured was entitled to make the assignment without his wife's consent, citing *In re Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147.

*Pugsley*, Q.C., and *McCready*, for the plaintiff.

*Van Wart*, Q.C., and *Jordan*, Q.C., for the defendants.

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## IN CHAMBERS.

[McLEOD, J., 25TH FEBRUARY, 1897.]

### HAMILTON v. McINTYRE.

*Appearance—Intituling in wrong Court—Clerical error—Interlocutory judgment—Motion to set aside—Defence on the merits.*

In an action at law the defendant served and filed an appearance intituled "In the Supreme Court—In Equity." The plaintiff disregarded the appearance and signed interlocutory judgment.

A motion by the defendant to have the interlocutory judgment set aside, and for leave to file a new appearance, as the irregularity was merely a clerical error, was granted with costs to the plaintiff in the action.

*Held*, that on such an application it is not necessary for the defendant to fully set out his defence; it is enough if he alleges that he has a good defence on the merits.

*E. R. Chapman*, for the plaintiff.

*John Montgomery*, for the defendant.

**In the County Court.****IN CHAMBERS.**

[FORBES, C.C.J., 8TH FEBRUARY, 1897.]

**DOHERTY v. PARLEE.**

*Parish Court—Trial of civil cause—Proof of jurisdiction of magistrate. when to be made.*

Review from the Parish Court of Sussex.

On the trial of this cause in the Court below, the plaintiff omitted to prove the magistrate's jurisdiction until after objection taken, whereupon the magistrate ruled that it was too late to do so after the defendant had gone into his case ; and accordingly nonsuited the plaintiff.

*Held*, that, under 42 V. c. 18, the plaintiff had a right to prove the jurisdiction of the magistrate after the objection was taken. The nonsuit was set aside with costs.

*J. P. Byrne*, for the plaintiff.

*Ora P. King*, for the defendant.

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**BRAYLEY v. MORRISON.**

*Parish Court—Trial of civil cause—Verdict—Entry of judgment—Adjournment.*

Review from the Parish Court of St. David.

This cause was tried on 20th October, 1896, before the Parish Court Commissioner, with a jury, who found a verdict for the defendant; but judgment was not entered until 11th December, 1896.

*Held*, that judgment could not be entered after verdict except on a day to which the Court had been adjourned, and that under C. S. N. B. c. 60, s. 25, no such adjournment can be for a longer time than one month.

*George C. Coster*, for the plaintiff.

*F. R. Chapman*, for the defendant.

## MANITOBA.

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In the Queen's Bench.

[FULL COURT, 27TH FEBRUARY, 1897.]

## REGINA v. ZICKRICK.

*Liquor License Act—R. S. M. c. 90—Prosecution—Conviction quashed—  
Fresh summons on same information—Prohibition granted.*

Appeal from decision of BAIN, J., noted *ante* p. 37, *sub nom.* *In re Hallsworth and Zickrick*. Appeal allowed, the order moved against set aside, and prohibition granted.

The information and conviction having been removed into this Court by *certiorari*, the jurisdiction of the justices was ousted.

The conviction having been quashed, there seemed to be no authority to warrant the sending back of the information or of any part of the record to the convicting justice; the consequence was, no new summons could be issued on the information.

*Wade*, for the applicant.

*Maclean*, for the justices.

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[FULL COURT, 27TH FEBRUARY, 1897.]

## PROCTOR v. PARKER.

*County Court—Sale of lands under certificate of judgment in—Q. B. Act, 1895, Rule 804.*

The plaintiff recovered judgment in a County Court against J. W. Parker, and registered a certificate of judgment in the Land Titles office; he alleged that J. W. Parker was the owner of certain lands, although the title to them stood in the name of Alexander Parker. The plaintiff proceeded in the Queen's Bench, under the Queen's Bench Act, 1895, Rule 804, and served a notice of motion, in which both J. W. Parker and Alexander Parker were named as defendants, calling upon the



former to show cause why his interest in the lands should not be sold to realize the balance then due upon the judgment. On the return day named in the notice, the motion was enlarged at the request of J. W. Parker, and, coming on again, no one appeared for him, but, Alexander Parker consenting, an order was made declaring the lands or the interest of J. W. Parker liable to be sold, directing certain inquiries and accounts to be made and taken, and ordering a sale upon default in payment. Against this order J. W. Parker appealed to the full Court.

The principal ground argued was that the judgment upon which the proceedings were founded being a County Court judgment, the Judge in Chambers had no jurisdiction to make the order. At the time the order was made the attention of the Judge was not called to the fact that the judgment was a County Court judgment.

*Held*, that the appeal should be allowed without costs, and the order set aside. The summary mode of procedure in Chambers, provided for by Rules 802 to 807 of the Queen's Bench Act, 1895, applies only to judgments of the Court of Queen's Bench, and cannot be held applicable to County Court judgments.

*Culver*, Q.C., for the plaintiff.

*Elliott*, for the defendant.

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### DIXON v. WINNIPEG ELECTRIC STREET R. W. CO.

*Master and servant—Workmen's Compensation for Injuries Act, 1893, and amendment—Action not commenced within time limited—Nonsuit.*

An appeal from the decision of BAIN, J., 16 Occ. N. 806, was dismissed with costs.

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### LAMBERT v. CLEMENT.

*Sheriff—Action against, for proceeds of execution—Prior claim of landlord for rent—Liability of sheriff to pay.*

Action in a County Court by an execution creditor against a sheriff, to recover the proceeds of goods taken in execution at the suit of the plaintiff. The sheriff seized grain on the farm

of Murray, the execution debtor, which he sold. At the trial he set up claims for rent and wages, which were disallowed and judgment given for the plaintiff.

The defendant appealed.

After removal of a portion of the grain from the premises, but before sale, a formal written notice of a claim for rent was given by the Imperial Loan Company to the sheriff. Murray had mortgaged his farm to the company by an instrument which contained an attornment clause. The company returned the cheque which the sheriff sent for rent, and he had made no other payment to the company. The reason given for refusing the amount tendered was not given, but it was clear the company never abandoned its claim, and the sheriff's liability to the company remained.

*Held*, that the appeal should be allowed with costs, and judgment entered for the defendant, with the costs of the action. The true principle is this: the sheriff, by carrying out the plaintiff's directions, rendered himself liable to the landlord, and the plaintiff was bound to indemnify him against this liability, and could insist on the balance only, after allowing for the year's rent which should have been paid before the goods were liable to satisfy his execution, being payable to him.

The facts that it had not been paid, and that there seemed to be some dispute about it between the landlord and the sheriff, might serve to throw suspicion on the reality of the liability for rent; but that liability being clearly shown, and being sufficient to exhaust the whole proceeds, the plaintiff should not recover the amount from the sheriff.

*W. A. Macdonald*, Q.C., for the plaintiff.

*Culver*, Q.C., and *Hull*, for the defendant.

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## NORTH-WEST TERRITORIES

## In the Supreme Court.

[RICHARDSON, J., 16TH FEBRUARY, 1897.]

*In re* MARTIN.

*Criminal law—Extradition—Grand larceny—Obtaining goods by false pretences.*

F. H. Martin was charged in the state of Minnesota with having committed grand larceny in the second degree, in that he obtained cattle from one Hance by means of a cheque issued on a bank in which the accused had neither an account nor credit, which cheque was accepted in payment for the cattle on the representation that there were funds to meet it. On obtaining the cattle, the accused disposed of them, and fled with the proceeds to the North-West Territories, where he was arrested on a warrant for his extradition to Minnesota to answer a charge of obtaining goods by false pretences.

By s. 2 (b) of the Extradition Act, R. S. C. c. 142, the expression "extradition crime" may mean any crime which, if committed in Canada, would be one of the crimes described in the first schedule to the Act; and the seventh in the list of crimes in the first schedule is "obtaining money or goods, or valuable securities, by false pretences."

*T. C. Johnstone* moved on the return of a *habeas corpus* for the prisoner's discharge, and contended that grand larceny was no offence in Canada, and that Art. 1 of the Imperial order-in-council of 1890 did not cover the offence of obtaining goods by false pretences, citing *In re Hall*, 8 A. R. 81; *In re Murphy*, 26 O. R. 168, 22 A. R. 886.

*Norman Mackenzie*, for the state of Minnesota, referred to *In re Murphy*, 26 O. R. at p. 176, *per* Meredith, C.J.; *In re Belencontre*, [1891] 2 Q. B. 122.

RICHARDSON, J., held that although the offence was known in Minnesota and Canada by different names, nevertheless the

same facts constituted and the same evidence would prove a crime in each country, and the name was immaterial; and that obtaining money by false pretences was an extradition crime under the Extradition Act and the Imperial order-in-council; and the accused was remanded for extradition.

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IN CHAMBERS.

[ROULEAU, J., 18TH FEBRUARY, 1897.]

HULL v. BRENER.

*Discovery—Production of documents—Affidavit—Controverting—Ordering second affidavit.*

An affidavit of a party on production of documents cannot be controverted.

The Court is not restricted to requiring from a party one affidavit only; but where the affidavit filed is positive and conclusive that all the documents relevant or relating to the action are set out in the schedules to the affidavit, the Court will not order a second one to be filed.

*Compagnie Financière v. Peruvian Guano Co.*, 11 Q. B. D. 68, distinguished.

*P. McCarthy*, Q.C., for the plaintiff.

*C. C. McCaul*, Q.C., for the defendants.

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MONGENAIS v. HENDERSON.

*Pleading—Joint tort-feasors—Sufficiency of allegations.*

The plaintiffs, insurers of plate glass windows, sued the defendants for damages for negligence whereby they broke a window insured by the plaintiffs, who had paid the loss, and claimed to be subrogated to the rights of the insured.

There were two defendants, Henderson and the Alberta Transfer Company.

The statement of claim alleged (1) that the defendants carried on a cartage business, and (2) that on a certain day they had negligently and improperly left their horses and waggons on a highway without having the horses properly tied, and without

any one in charge of them, owing to which negligence the horses ran and frightened another horse, making it run also, whereby the window was broken; and the plaintiffs claimed from the defendants \$107 and costs.

Upon motion by one of the defendants, under s. 89 of the Judicature Ordinance, to strike out the statement of claim as embarrassing, or to compel the plaintiffs to elect to sue one or other defendant, or to amend so as to show that the defendants were sued as joint tort-feasors:—

*Held*, that both defendants were complained of as tort-feasors, because the combined action of both was alleged to have broken the pane of glass. The tort occasioned was one and the same act, and, therefore, the defendants must necessarily be sued jointly. There was no necessity to add to the statement of claim the word “jointly.” It was sufficient to allege the defendants’ liability and ask judgment against them. The very fact that they were sued together for the same cause of action showed that they were sued jointly.

*P. McCarthy*, Q.C., for the plaintiffs.

*C. C. McCaul*, Q.C., for the defendant Henderson.

*Winter*, for the other defendants.

## CONRAD v. ALBERTA MINING CO.

*Writ of summons—Omission of address of parties—Motion to set aside writ—Procedure—Notice of motion—Irregularity—Amendment—Costs—Service out of jurisdiction—Subject-matter of action—Lands in jurisdiction.*

An application to set aside a writ of summons on the ground that there is no statement therein of the places of residence and addresses of the various parties must be made upon notice of motion, and not by way of summons.

Where a summons has been discharged because the proper procedure is by notice of motion, the grounds taken are open upon notice of motion subsequently given.

A writ of summons will not be set aside for omission to state the residence and address of any party, unless the omission was deliberate and intentional. The omission makes the writ irregular, but it will be amended on payment of costs.

*The W. A. Sholten*, 18 P. D. 8, distinguished.

An action by judgment creditors to declare defendants resident in a foreign country trustees for the judgment debtor of lands situated within the jurisdiction of the Court, and for sale of the lands to satisfy the judgment, is an action in which the whole subject-matter is land situate within the judicial district, within the meaning of the Judicature Ordinance, s. 32, s.-s. 1, and service out of the jurisdiction of the writ of summons should be permitted.

*C. C. McCaul, Q.C., for the foreign defendants.*

*P. McCarthy, Q.C., for the plaintiffs.*

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[24TH FEBRUARY, 1897.]

### POLLINGER v. LONDON ACCIDENT CO.

*Pleading—Statement of defence—General denial—Specific denial—Amendment—Motion to strike out defence—Joinder—Estoppel.*

In an action against the sureties of a sheriff for his negligence and failure to discharge his duties, whereby certain goods seized by him under the plaintiff's writ were stolen, etc., the statement of defence was as follows: "The defendants deny each and every allegation contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the plaintiff's statement of claim."

Upon an application by the plaintiff to strike out the statement of defence as embarrassing, it was objected that the plaintiff, having joined issue, was estopped from making the application.

*Held*, that this objection was not well taken, s. 120 of the Judicature Ordinance providing that the Judge may at any stage of the action order a statement or proceeding to be struck out or amended.

*Held*, also, that the pleading in question was not strictly in accordance with the form required by s. 111 of the Judicature Ordinance, and should be amended so as to specify every material allegation which the defendants intended to deny.

*Adkins v. North Metropolitan Tramways Co.*, 63 L. J. Q. B. 861, referred to.

*C. C. McCaul, Q.C., (for C. E. D. Wood), for the plaintiff.*

*Bennett (for Harris & Burne), for the defendants.*

## Supreme Court of Canada.

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ONTARIO.]

[25TH JANUARY, 1897.]

### DRENNAN v. CITY OF KINGSTON.

*Municipal corporations—Highways—Negligence—Snow and ice on sidewalks—By-law—Construction of statute—55 V. c. 42, s. 531—57 V. c. 50, s. 13—Finding of jury—Gross negligence—Notice of accident—Dispensing with.*

A by-law of the city of Kingston required frontagers to remove snow from the sidewalks. It was allowed to remain on the crossings, which were therefore higher than the sidewalks, and, when pressed down by traffic, an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and, being severely injured, brought an action for damages against the city corporation, and obtained a verdict.

The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of the accident in such case must be given, but may be dispensed with on the trial, if the Court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence.

*Held*, affirming the decision of the Court of Appeal, 28 A. R. 406, 16 Occ. N. 212, Gwynne, J., dissenting, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair.

*Cornwall v. Derochie*, 24 S. C. R. 801, followed.

It was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act.

*Held*, also, that "gross negligence" in the Act means very great negligence, of which the jury found the corporation guilty; and that an appellate Court would not interfere with the discretion of the trial Judge in dispensing with notice of the accident.

*Walkem*, Q.C., for the appellants.

*J. B. Hutcheson*, for the respondent.

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[10TH MARCH, 1897.]

TALBOT v. CANADIAN COLOURED COTTON MILLS  
CO.

*Master and servant—Negligence—Accident—Proximate cause—Evidence for jury.*

T. was employed as a weaver in a cotton mill, and was injured, while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained some 400 looms, and for every forty-six there was a man, called the "loom fixer," whose duty it was to keep them in proper repair. The evidence showed that the accident was caused by a bolt breaking by the shuttle coming against it, and as this bolt served as a guard to the shuttle, the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within a reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal.

*Held*, GWYNNE, J., dissenting, that the "loom fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that, although the mill was well equipped, as the jury had found the accident due to negligence, and there was evidence to justify such finding, the verdict should stand.

*Per* GWYNNE, J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to show that such examination



could have prevented the accident, and there should be a new trial.

*E. Martin*, Q.C., for the appellants.

*D'Arcy Tate*, for the respondent.

QUEBEC.]

[25TH JANUARY, 1897.

MACDONALD v. WHITFIELD.

WHITFIELD v. MERCHANTS BANK.

*Principal and surety—Judgment against sureties—Discharge of one—Trust funds—Rights of co-sureties—Guaranty.*

A bank, holding judgments against several sureties, released one, reserving recourse against the others, with a declaration that the release gave no warranty against claims which the other sureties might seek to enforce against the one released, by reason of the exercise of the recourse reserved. The surety released had at the time a sum of money in his hands to be applied towards payment of the bank's debt.

*Held*, that, notwithstanding the release, the surety could be compelled by his co-sureties to pay such moneys to the bank or to the co-sureties, if the bank had been paid by them.

*Held*, also, that the bank was not liable as a warrantor to the sureties not released, having entered into no agreement creating an obligation in guaranty towards them.

Judgment of the Court below affirmed.

*Geoffrion*, Q.C., and *Fleet*, for the appellant.

*Abbott*, Q.C., and *Taylor*, for the respondents.

[25TH FEBRUARY, 1897.

McGOEY v. LEAMY.

*Appeal—Bornage—Agreement as to—Title to land—Future rights—R. S. C. c. 135, s. 29—54 & 55 V. c. 25, s. 2.*

The owners of contiguous lands, with no established line of division, agreed by notarial deed to have a line established

by a surveyor, but one owner refused to accept the surveyor's report, and to acquiesce in the boundary thereby fixed. In an action by the other owner to have the same declared the true line of delineation, the Court of Queen's Bench held that the report did not bind the parties.

*Held*, that the judgment affected title to land and might bind future rights, and an appeal therefrom would lie to the Supreme Court of Canada.

*Foran*, Q.C., for the appellant.

*Geoffrion*, Q.C., and *Champagne*, for the respondent.

[26TH FEBRUARY, 1897.]

### DEMERS v. BANK OF MONTREAL.

*Appeal—Commercial case—Trial by jury—Refusal of—Interlocutory matter.*

By Arts. 448, 449, and 450, C. C. P., trial by jury may be had in actions on debts, promises, and agreements of a mercantile nature, at the option of either party. In this case the trial Judge held that the action was not mercantile, and refused a jury, and his decision was affirmed by the Court of Queen's Bench. On motion to quash an appeal to the Supreme Court:—

*Held*, that the judgment of the Queen's Bench was interlocutory only, and an appeal did not lie.

*Fitzpatrick*, Q.C., S.-G., and *A. Ferguson*, Q.C., for the motion.

*Lane*, contra.

NOVA SCOTIA.]

[20TH FEBRUARY, 1897.]

### MACKENZIE v. MACKENZIE.

*Trusts and trustees—Taking conveyance of land in name of another—Intent to defraud creditors—Action for declaration of trust—Parties in pari delicto.*

In 1875 G. M. entered into an agreement with the owner to purchase two lots of land in Halifax, and entered into possession and commenced to build a house on one of the lots. In 1877 he was called upon to carry out his agreement and pay the purchase money, the house not being completed, but sufficiently so as to

enable him to occupy it. At that time G. M. had become financially embarrassed and could not make the payment. He applied to a building society for a loan, but, as there were judgments recorded against him which would have priority, he caused the deed to be executed in the name of W. M., his nephew, and then procured the loan. W. M. afterwards took possession of the property, and an action was brought against him by G. M. to compel him to execute a conveyance for an account of rents and profits. The trial Judge held that the deed was taken in the nephew's name to hinder, delay, and defraud creditors, and refused the relief asked for. The Court *en banc* reversed this judgment and ordered W. M. to convey the property to G. M.

*Held*, affirming the decision of the Supreme Court of Nova Scotia, that it did not appear from the evidence that G. M., in having the deed made in the name of his nephew, had the intent of defrauding his creditors, who were not prejudiced and had not complained; that the parties were not in *pari delicto*, and G. M. was entitled to relief as the more excusable of the two.

*Whitman*, for the appellant.

*Silver*, for the respondent.

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## ONTARIO.

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### Supreme Court of Judicature.

### COURT OF APPEAL.

DIVISIONAL COURT.]

[16TH MARCH, 1897.]

D'IVRY v. WORLD NEWSPAPER CO. OF TORONTO.

*Discovery—Defamation—Production of documents—Privilege—Criminating answers—R. S. O. c. 61, s. 5—Incorporated company—Indictment.*

A person is protected against answering any question not only that has a direct tendency to criminate him, but that

forms one step towards doing so, but the person, or in the case of a corporation, an officer, must pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well founded.

The statute, R. S. O. c. 61, s. 5, has merely embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness or for the purpose of discovery.

In regard to the production of documents the same privilege exists as in regard to questions put to a witness or party.

The proposition that a corporation is not liable to an indictment for libel is at least so doubtful that it would not be proper to compel a newspaper publishing corporation to make production of documents which might subject them to a criminal prosecution.

*Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. 857, specially referred to.

Legislation suggested, similar to 32 & 33 V. c. 24 (Imp.), to afford an easy means of proving by whom a newspaper is published.

*H. M. Mouat*, for the plaintiff.

*King*, Q.C., for the defendants.

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[17TH MARCH, 1897.]

### RUSSELL v. FRENCH.

*Appeal—Court of Appeal—Mechanics' liens—Amount involved—59 V. c. 35, ss. 38, 39, 40.*

In an action to enforce a mechanic's lien the plaintiff was awarded by the judgment of the referee who tried the action \$126.80, but upon appeal to a Divisional Court this amount was increased to more than \$800.

*Held*, having regard to the provisions of ss. 38, 39, and 40 of the Mechanics and Wage-Earners' Lien Act, 1896, that no appeal lay to the Court of Appeal from the order of the Divisional Court.

*J. H. Denton*, for the plaintiff.

*Snow*, for the defendants Carroll and others.

Boyd, C.]

[1st MARCH, 1897.

## FAIRBANKS v. TOWNSHIP OF YARMOUTH.

*Railways—Municipal corporations—Overhead bridge—Approaches thereto—Unlawful incline—Accumulation of snow—Accident—Liability—Negligence—Want of repair—Nonfeasance.*

The defendant railway company, having obtained the sanction of the defendant municipality to erect an overhead bridge across a highway, made the approaches thereto at a greater incline than required by the Railway Act, 51 V. c. 29 (D.), and afterwards further increased the incline by raising the bridge. An accumulation of snow resulted from this action of the railway company, against which the plaintiff's cutter was upset, and the plaintiff sustained injuries for which she brought this action.

*Held*, that the accumulation of snow, under the circumstances, amounted to a want of repair, and whatever might be the obligation of the railway company as between them and the municipality, it was the duty of the latter under s. 531 of the Municipal Act to keep the approaches and the bridge in repair; and the municipality were liable to the plaintiff.

*Held*, further, that the railway company were also liable to the plaintiff for a misfeasance, having been guilty of an unlawful act in constructing and maintaining the bridge and approaches in direct contravention of the Railway Act, thus causing the obstruction which caused the accident.

*Held*, also, per MACMAHON, J., that, although the Railway Act is wanting in explicitness in prescribing the duties of a railway company in respect to repairing and maintaining bridges over highways, it is the apparent intention of the Act that the railway company should keep in repair, not only the bridge, but also the approach to it made necessary by its erection; and the railway company were liable here to the plaintiff for the nonfeasance.

*D. W. Saunders*, for the appellants the Michigan Central R. R. Co.

*J. A. McLean*, for the defendants the township corporation.

*W. Nesbitt*, for the plaintiff.

ROSE, J.]

[18TH MARCH, 1897.

*In re* CASSIE—TORONTO GENERAL TRUSTS CO. v.  
ALLEN.*Costs—Will—Appeal—Costs out of estate—Watching brief.*

The costs of opposing an unsuccessful appeal from a judgment establishing a will and codicil were ordered to be paid to the respondents, who were the executors and certain legatees, out of the estate, in the event of their not being able to make them out of the appellant; the costs of the executors to be only as on a watching brief.

*W. R. Riddell*, for the appellant.*H. Cassels* and *W. C. Chisholm*, for the respondents.

## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 27TH APRIL, 1896.

## GARDINER v. MUNRO.

*Account—Moneys advanced—Securities—Bonuses and commissions—Renewals.*

Where securities are of a speculative or unsatisfactory nature, bonuses or commissions actually deducted by the lender at the time of the advances are properly chargeable.

Where no money passes on the renewal of mortgages or promissory notes, bonuses or commissions charged in addition to interest are not properly chargeable.

*Leitch*, Q.C., and *C. A. Myers*, for the plaintiff.*Moss*, Q.C., and *Hilliard*, for the defendant.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 12TH MARCH, 1897.

## MONES v. McCALLUM.

*Receiver—Equitable execution—Right to bring actions—Parties—Judgment debtor.*

A receiver appointed by the Court to aid a judgment creditor in recovering his claim, by receiving the judgment debtor's

share in an estate which cannot be reached by execution, is to get in the estate for the benefit of those who may be found entitled, and if it be necessary to bring actions for the recovery of any of the assets, the Court will from time to time authorize him to bring such actions in the name of the proper parties, whether they be plaintiffs or defendants, and whether they be willing or unwilling; but the receiver himself should not be a party to any such action.

Decision of BOYD, C., 17 P. R. 356, *ante* 59, reversed.

*Idington*, Q.C., for the plaintiffs.

*E. R. Cameron*, for the defendant *W. A. McCallum*.

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[BOYD, C., 6TH MARCH, 1897.]

#### MAIL PRINTING CO. v. CLARKSON.

*Bankruptcy and insolvency—Right to prove on insolvent estate—R. S. O. c. 124, s. 20, s.-s. 4—Claim “not accrued due”—Construction of contract.*

In an action for a declaration of the plaintiffs' right to rank upon an insolvent estate in the hands of the defendant, as assignee under R. S. O. c. 124, in respect of a claim for \$1,000 upon an advertising contract, by which the insolvents agreed that, should they not avail themselves of the right to occupy a certain space in the plaintiffs' newspapers within a year, such failure should not relieve them from the obligation to pay the plaintiffs, at the expiration of the year, the sum of \$1,000, it appeared that the insolvents had assigned to the defendant before the expiration of the year.

*Held*, that the plaintiffs' “claim had not accrued due” at the time of the assignment, within the meaning of R. S. O. c. 124, s. 20, s.-s. 4, but did accrue due by mere effluxion of time at the end of a year from the date of the contract; and they were therefore entitled to prove.

*C. J. Holman*, for the plaintiffs.

*D. E. Thomson*, Q.C., for the defendant.

[18TH MARCH, 1897.]

## BAKER v. STUART.

*Will—Construction—Accumulation clause—Perpetuity—52 V. c. 10, s. 2—  
Intestacy—Descent.*

Action for construction of the will of James N. Stuart.

The testator gave to his wife all his personal property, and continued, "I order my executors to lease and rent and invest from one to five years from time to time all lands, money, and mortgages that I may be possessed of at the time of my death, for the term of sixty years, and for to appoint their successors, and at the expiration of sixty years the property and funds shall be divided to those of my heirs that are members of the Presbyterian Church only, and that has been members of the said church for at least ten years."

*Held*, that the clause of the will quoted was invalid as infringing the rules against perpetuity and being in contravention of the provisions of the Thellusson Act (Ontario Act 52 V. c. 10, s. 2). Under the rule as to perpetuities, property cannot be tied up longer than for a life in being and twenty-one years after; and the limit of sixty years may continue very much longer: *Curtis v. Lukin*, 5 Beav. at p. 154.

This period is shortened by the Thellusson Act, and no part of the accumulating clause can be saved under that Act, for the whole is held in suspense till the sixty years has expired.

The result is that, in legal construction, this clause of the will has to be expunged, leaving all the rest standing good, according to the rule in *Eyre v. Marsden*, 2 Keen 569, and *Coombe v. Hughes*, 34 Beav. 127, 2 D. J. & S. 657.

Judgment accordingly declaring the clause above quoted inoperative, and declaring that the widow of the testator takes all the personalty and is entitled to dower out of the realty, which will descend as upon an intestacy to the other defendants, heirs-at-law of the testator, according to their several proportions.



[ARMOUR, C.J., 19TH MARCH, 1897.]

**FREEBORN v. FREEBORN.**

*Limitation of actions—Mortgage—Action on covenant—Period of limitation  
—Tenants in common—Partition—Dower.*

Motion by the plaintiff for judgment on the pleadings in an action against the administrator, the widow, and the heirs-at-law of the deceased mortgagor, James Freeborn, in an action upon the covenant for payment in a mortgage, and also for a declaration that certain lands had been effectually partitioned between the plaintiff and the intestate. The lands were partitioned between the plaintiff and the intestate, who were tenants in common, and the intestate made a mortgage to the plaintiff over his half, which was the mortgage now sued on.

*Shepley, Q.C., and Ebbels, for the plaintiff.*

*W. R. Riddell, for the defendants the widow and the heirs-at-law, contended that more than ten years having elapsed since maturity of the mortgage, the plaintiff's claim upon the covenant was barred, and also that the widow was not bound by the agreement for partition made by her deceased husband, but was entitled to dower in an undivided half of the half assigned to the plaintiff.*

*D. B. Simpson, for the defendant Allen, the administrator.*

*Held, that the plaintiff and James Freeborn, the deceased mortgagor, were tenants in common of the lands in question, and that they made a valid and effectual agreement for partition, whereby the west half was allotted to the plaintiff and the east half to the deceased, and that such agreement was effectual to vest the west half in the plaintiff free from any claim to dower on the part of the defendant Mary Freeborn, the widow.*

*Held, also, that the plaintiff's claim upon the covenant was not barred by ten years' lapse of time.*

*Allan v. McTavish, 2 A. R. 278, followed.*

If the words "out of any land" in the second line of s. 23 of R. S. O. 1887 c. 111 had been in the English Act, the decision in *Sutton v. Sutton*, 22 Ch. D. 511, would have been the other way.

There should be judgment for the plaintiff against the defendant Allen, as administrator, for the amount of the mortgage debt, \$800, and interest for six years prior to this action.

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[FERGUSON, J., 9TH MARCH, 1897.]

*In re* CENTRAL BANK OF CANADA.

*Appeal—Leave—Order for leave to appeal.*

An order giving leave to appeal is an order from which an appeal does not lie; and therefore leave to appeal from such an order will not be granted.

*Re Sarnia Oil Co.*, 15 P. R. 347, *Ex p. Stevenson*, [1892] 1 Q. B. 394, 609, and *Kay v. Briggs*, 22 Q. B. D. 343, followed.

*S. H. Blake*, Q.C., and *W. R. Smyth*, for the applicants.

*Moss*, Q.C., and *F. E. Hodgins*, contra.

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[STREET, J., 13TH MARCH, 1897.]

LILLICO v. BRYDON.

*Will—Construction—Distribution of estate—"Relations"—Per capita—Period of ascertainment.*

Action for construction of a will, heard by way of motion for judgment on the pleadings.

The testator divided his property as follows, "one-third to my relations, one-third to my wife's relations, and the remaining one-third to the proper authorities in that behalf for the home mission fund of the Presbyterian Church in Canada." The testator's wife predeceased him by a few months.

*Held*, that the persons to take under the description of "relations" were those of the next of kin of the testator and his wife entitled under the Statute of Distributions, but they took *per capita* and not *per stirpes*. The next of kin of the testator's wife were the same persons who would have been entitled had she and her husband died on the same day, so that no difficulty was created by the fact of their having died on

different days. The next of kin of the wife who would take under the statute were to be ascertained, and one-third of the testator's estate was to be divided amongst them equally. The next of kin of the testator who would take under the statute were also to be ascertained, and one-third of the testator's estate was to be divided in like manner amongst them equally. The persons to take were those answering the description at the testator's death, and their several interests were to be treated as having been then vested in them.

Jarman on Wills, 8rd ed., vol. 2, p. 109, and cases there cited; *Tiffin v. Longman*, 15 Beav. 275, referred to.

*Robert Barrie*, for the plaintiffs.

*R. O. McCulloch*, for the nephews and nieces of the testator.

*J. J. A. Weir*, for the brothers and sisters of the testator.

*J. Hoskin*, Q.C., for the infant defendants.

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[MEREDITH, J., 22ND JANUARY, 1897.]

*In re* HAY AND TOWN OF LISTOWEL.

*Municipal corporations—By-law—Debentures—Time for payment—55 V. c. 42, s. 340 (2).*

A by-law passed for the construction of waterworks and gas or electric light works made the debentures to be issued thereunder payable in thirty years from the date on which the by-law took effect.

*Held*, that the by-law was bad; for, upon the proper construction of s. 340 (2) of the Consolidated Municipal Act, 1892, the time for the payment of debentures for such works as specified in the by-law was limited to twenty years.

*W. M. Douglas*, for the applicant.

*Aylesworth*, Q.C., and *Walter Read*, for the town corporation.

## IN CHAMBERS.

[BOYD, C., 4TH MARCH, 1897.]

REGINA *ex rel.* MASSON v. BUTLER.*Municipal elections—Quo warranto—Withdrawal of relator—Intervention—Substitution.*

Where the relator in a proceeding in the nature of a *quo warranto* under the Consolidated Municipal Act, 1892, desires to withdraw, the Court has no power, under the statute or otherwise, to compel him to go on against his will, nor to substitute a new relator.

The power given by s. 196 is to substitute a new defendant, not a relator.

*R. J. Wicksteed*, for the intervener.

*O' Gara*, Q.C., for the defendant.

[MEREDITH, C.J., 19TH MARCH, 1897.]

## CAMERON v. ELLIOTT.

*Venue—Change of—County Court action—Rule 1260—Second application—Appeal—Law Courts Act, 1895, s. 9 (2).*

Where in a County Court action an application has been made to the Master in Chambers, under Rule 1260, to change the place of trial, no appeal lies from his order; and a second application for the same purpose, not based upon any new state of facts arising since the first application was made, will not be entertained by a Judge in Chambers.

*McAllister v. Cole*, 16 P. R. 105, followed.

*Milligan v. Sills*, 18 P. R. 350, not followed, with the concurrence of the Judges who decided it, pursuant to s. 9 (2) of the Law Courts Act, 1895.

*W. E. Middleton*, for the plaintiff.

*Beatty (W. J. Elliott)*, for the defendant.

[FERGUSON, J., 9TH MARCH, 1897.]

BELAIR v. BUCHANAN.

*Security for costs—Plaintiff out of jurisdiction—Property in jurisdiction.*

Where the plaintiff lived out of the jurisdiction but had real property in the jurisdiction, incumbered, but of the value of \$510 over and above all incumbrances and all debts that it was shown or suggested that he owed, a præcipe order for security for costs was set aside.

*W. Read*, for the plaintiff.

*J. Bicknell*, for the defendant.

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[STREET, J., 18TH MARCH, 1897.]

HOFFMAN v. CRERAR.

*Discovery—Production of documents—Affidavit—Privilege—Confidential communications—Solicitor and client—Application for better affidavit.*

In an affidavit of a party on production of documents, a certain letter was described by its date and as being from a firm of solicitors to the deponent, who said that he objected to produce it; that it was a communication between solicitor and client, and was privileged.

*Held*, doubting, but following *Hamlyn v. White*, 6 P. R. 148, that the statement was sufficient to protect the document from production.

In the same affidavit two other letters were described by their dates and as being from a solicitor to a firm of solicitors, and a copy of a letter written in answer to one of them was similarly described. These documents, the affidavit stated, were in the possession of the solicitors for the deponent and others in another action, and he objected to produce them and claimed privilege for them "on the ground that they are communications between solicitor and client and between my solicitors and others in the course of their conducting my business."

*Held*, that these letters not being written to or by the deponent, there was no reasonable intendment that the deponent was the "client" referred to, nor that they were necessarily confidential because they were written by the deponent's

solicitors to other persons in the course of their conducting his business; and the opposite party was entitled to a better affidavit on production, in which the deponent might set up other grounds of protection.

It is irregular to go into the merits upon an application for a better affidavit.

*Morris v. Edwards*, 23 Q. B. D. 287, followed.

*D. L. McCarthy*, for the plaintiff.

*J. H. Moss*, for the defendant Crerar.

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## NEW BRUNSWICK.

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In the Supreme Court.

IN EQUITY.

[BARKER, J., 16TH MARCH, 1897.]

LAUGHLAN v. PRESCOTT.

*Timber license—Crown land regulations—Agreement to assign license—Assignment to innocent purchaser—Notice—Priority—License not an interest in land—Registration of assignment—Agreement not to bid at public sale—Legality.*

In 1893 one M. purchased at a Crown lands sale a license to cut lumber on certain Crown lands, and a license was issued to him dated 1st September, 1893, to remain in force until 1st August, 1894. A Crown lands regulation, incorporated in the license, provided that it might be assigned by writing, signed by the licensee; that the assignee should within reasonable time give notice of its assignment and date to the Surveyor-General; and that the assignment should take effect from the date upon which notice of it was received at the Crown lands office. Another regulation provided that the licensee, if he had paid his stumpage dues in full, and otherwise fully complied with all the conditions of the license, on or before 1st August in each year, should be entitled to annual renewals of the license on payment of mileage at a certain rate, and that such renewals

might be for a term of twenty-four years. One L., being desirous of obtaining lumber privileges in a portion of the area included in the license to M., entered into an arrangement with M. before the sale that M. should buy in the block and afterwards secure to L. the privileges he wished. Accordingly, after the sale, they entered into a written agreement dated the 31st August, 1893, reciting the purchase by M., his agreement to sell to L. for the term for which the license should issue and renewals, to cut and carry away cedar lumber in a certain area, and lumber of all kinds in another area; that L. was to pay M. \$40 and the renewal mileage each year on a certain number of miles during the continuance of the privilege; and M. agreed to renew the license. The agreement was not under seal. Immediately after its execution it was filed in the Crown lands office. The \$40 mentioned in the agreement was duly paid by L., and in August, 1894, he paid to M. \$20 for renewal mileage. The parties after filing the agreement interchanged copies prepared by M. from memory, which recited the purchase by M.; that he in consideration of \$40 had agreed to sell to L., who agreed to buy the right to cut, carry away, and appropriate to his own use the cedar lumber in a certain area, and lumber of all kinds in a certain other area; that the privilege to cut lumber was to exist for the term for which the licenses were issued, and for all renewals thereof; that L. agreed to pay M. the renewal mileage on a certain number of miles every year; that on the failure by L. to pay such renewal mileage, M. was to have the right to cancel the privilege; and that the stumpage on lumber cut by L. was to be paid by him. By assignment dated the 10th February, 1894, and indorsed on the above agreement, L. assigned all his right, title, and interest in the license to the plaintiffs. This instrument was not under seal, and was never filed in the Crown lands office. On the 29th November, 1894, M., being in possession of the license, transferred it under seal to the defendants. The renewal license for 1894 had not then been issued to M., and on their assignment being produced by the defendants at the Crown lands office, the renewal was issued to them dated 1st August, 1894, and renewed again in August, 1895. In August, 1895, L. sent his cheque to M. for his share of the renewal mileage. At the time of the purchase of the license by the defendants they had no knowledge of the agreement of M. with

L., and had inquired at the Crown lands office, and were informed that the license was all right, and a renewal would be issued to them.

*Held*, 1. That the agreement between M. and L. made before the sale of the license was not illegal.

2. That the license did not convey an interest in land, and that its assignment did not need to be under seal and registered in the registry office of the county where the land was.

3. That the agreement of M. with L., or his transfer to the plaintiffs, was not an assignment of the license, but at most a mere sub-license, conferring no right of renewal against the Crown, and was only an agreement by M. to sell certain rights under the license and enforceable against M. by specific performance on his taking out renewals, or giving rise to an action for breach of agreement in event of his failure to obtain renewals, but giving no rights against the defendants, who had acquired the renewals from the Crown as M.'s assignees, and without notice of the agreement.

4. That the defendants were under no obligation or duty to search at the Crown lands office relative to the title of M. to assign the license.

*C. A. Palmer*, Q.C., and *John Montgomery*, for the plaintiffs.

*G. G. Gilbert*, Q.C., and *W. A. Trueman*, for the defendants.

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## MANITOBA.

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IN the Queen's Bench.

[FULL COURT, 27TH FEBRUARY, 1897.]

*In re* COMMERCIAL BANK OF MANITOBA.

BARKWELL'S CLAIM.

*Banks and banking—Deposit receipt marked "not transferable"—Claim of assignee to payment—Receipt, evidence of debt—Right to recover.*

The bank issued to R. H. Barkwell a deposit receipt for £800; across the receipt were printed the words "not transferable."



The receipt was afterwards indorsed and delivered by R. H. Barkwell to W. S. Byers Barkwell.

The bank having been put into liquidation under the Winding-Up Act, W. S. Byers Barkwell applied before BARN, J., to be placed on the list of creditors of the bank in respect of the deposit receipt, and an order was made dismissing his application. Against this order he appealed to the full Court.

*Held*, that the deposit receipt was not a negotiable instrument and could not be transferred by indorsement and delivery. But, when the money in question was deposited with the bank, the bank agreed to repay it, and a debt was created. The receipt itself was not the debt, but only evidence of it, and the debt existed independently of the receipt.

The restrictive words could not mean absolutely that the money deposited should be payable only to the depositor personally, and that no person else could, under any circumstance, claim it.

As a debt due by the bank to R. H. Barkwell, it was capable of being assigned by him under the provisions of the Administration of Justice Act, R. S. M. c. 1, s. 3.

The order below should be discharged, and the matter remitted to Chambers for proof of the claim, without costs of the appeal. Costs of the original application, so far incurred, to be dealt with in Chambers.

*Wilson*, for the applicant.

*Tupper*, Q.C., for the liquidators.

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## BANK OF BRITISH NORTH AMERICA v. McINTOSH.

*Chattel mortgage—Future crops—Continuing security.*

An interpleader issue in the County Court of Brandon as to certain grain seized under an execution against the defendant, and claimed by the Massey-Harris Company under a chattel mortgage executed to them by the defendant.

On the 31st October, 1898, the defendant executed a chattel mortgage to the claimants of the crop of grain then standing or to be grown within one year from the date of the mortgage on the land therein mentioned, and it was thereby agreed that "all the crops of grain which the mortgagor may from time to

time grow upon any of the lands from the date hereof until the whole of the principal money and interest secured hereby shall be fully paid and satisfied, whether before or after the maturity hereof, shall be included in this mortgage . . . and the said mortgagor shall from time to time, upon request, execute such further mortgage or mortgages of such crops to be grown . . . to the intent that such crops shall be effectually held as a security for the payment of the debt secured."

In February, 1895, the defendant gave the claimants a chattel mortgage on the crop to be grown on the land in 1895.

In March, 1896, the defendant gave the claimants a chattel mortgage on the crop to be grown on the land in 1896.

Each of the mortgages of 1895 and 1896 contained the following provision:—"Notwithstanding anything hereinbefore contained, it is expressly understood and agreed between the parties that this security is taken as collateral security only for the payment of the said debt, and is not intended to operate as a merger of the said simple contract debt, nor in any way prejudicially affect . . . the rights, remedies, or powers, legal or equitable, held by the mortgagees under any existing mortgage to them."

CUMBERLAND, Co.J., held that this clause showed that it was not intended to abandon the old security on taking the new, and that the old mortgage was a valid and subsisting charge on the crop in question grown in 1896, and that under it the claimants were entitled to succeed, and he entered a verdict for the claimants with costs. The plaintiffs appealed to the full Court.

*Held*, that the judgment of the County Court should be affirmed, and the appeal dismissed with costs.

*W. A. Macdonald*, Q.C., for the plaintiffs.

*Culver*, Q.C., and *Hull*, for the claimants.

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[KILLAM, J., 11TH MARCH, 1897.]

### MCKENZIE v. FLETCHER.

*Real Property Limitation Act, R. S. M. c. 89 — Judgment — Payment by trustee for creditors—Application to issue execution against debtor.*

Application for leave to issue execution upon a judgment recovered against the defendant on 21st December, 1883.

The only question raised was as to whether the right to enforce the judgment had been barred under s. 24 of the Real Property Limitation Act, R. S. M. c. 89.

On 26th November, 1888, Fletcher executed a deed to T. B. Millar of all his real and personal property upon trust to realize the same and divide it among creditors.

Millar realized the property and paid the plaintiff \$41.28 on 8th December, 1888, before judgment recovered, and \$28.78 on 10th March, 1888, but no other payment had been made on account of the judgment debt. On 26th December, 1888, a declaration of the plaintiff's solicitor stating that Fletcher was indebted to McKenzie in \$220 upon the judgment was made and delivered to the assignee. The applicant relied upon the payment of March, 1888, as preserving his rights under the judgment.

*Held*, that the assignee held the moneys realized as trustee for the various creditors, and in paying them he was doing so as trustee for them. The creditors were bound to give credit to Fletcher for the moneys received, as against his liabilities to them, but the payments made by the assignee were made in satisfaction of his liability to them as their trustee, and not as a satisfaction of Fletcher's liabilities. The clauses of the deed declaring the trusts to divide moneys among creditors did not constitute the assignee an agent for the purpose of paying them on behalf of the debtor. They merely set forth the duty of the assignee to the creditors and gave the latter the beneficial interest in the moneys realized by the assignee.

The payments made by the assignee could not be considered payments of the principal money secured by the judgment, or of any interest thereon, within the meaning of the statute.

*Jay v. Johnstone*, [1898] 1 Q. B. 189, *Harlock v. Ashbury*, 19 Ch. D. 589, and *Lewis v. Wilson*, 9 S. C. R. 687, 11 App. Cas. 689, followed.

Application dismissed with costs.

*Culver*, Q.C., for the plaintiff.

*Mathers*, for the defendant.

*In re* BUCKNAM AND STEWART.

*Real Property Act—Mortgage—Possession—Statute of Limitations—Form of issue—Who to be plaintiff.*

**Application under the Real Property Act.**

A mortgagee having applied to bring land under the Act, a caveat was filed, and the caveator took proceedings by petition for the purpose of establishing his claim.

The petition showed that the petitioner claimed under the mortgagor by a title subsequent to the mortgage; it alleged possession in the caveator, and contained allegations directed towards showing that any right of the mortgagee to recover the land was barred by the Real Property Limitation Act, R. S. M. c. 89. The prayer was that the petitioner might be declared entitled to an equitable estate in fee simple and to retain possession of the land.

In showing cause to the petition the caveatee filed an affidavit by which he sought to prove that for at least twelve years past the land had been wholly unoccupied and in a state of nature, and that the petitioner never had been in possession; in reply to which the petitioner filed an affidavit in proof of his possession.

The question was as to the nature and form of the issue and the party to be made plaintiff therein.

*Held*, that the only question that should be tried was that of the barring of the mortgagee's former interest, and that the onus of showing it barred should be cast upon the petitioner.

The issue would be, whether, at the time of the lodging of the petitioner's caveat, the right of the caveatee, under the mortgage mentioned in the petition, to make an entry upon or to bring any action or suit for the recovery of the land comprised in the mortgage had ceased to exist, and the petitioner should be the plaintiff in the issue.

*Tupper*, Q.C., for the caveator.

*Haggart*, Q.C., for the caveatee.

## Supreme Court of Canada.

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QUEBEC.]

[24TH MARCH, 1897.]

*In re* BEAUHARNOIS DOMINION ELECTION.

BERGERON v. DESPAROIS.

*Parliamentary elections—Petition—Service of—Preliminary objections—  
Bailiff's return—Cross-examination—Production of documents.*

A preliminary objection filed to an election petition was that it had not been properly served. The bailiff's return was that he had served it by leaving a copy "duly certified" with the sitting member. By Art. 56, C. C., a writ or other document is served by giving to the person on whom service is to be effected a copy certified by the prothonotary, attorney, or sheriff; and it was contended that the return in this case should have shown by whom the copy was certified. On the hearing the counsel for the sitting member wished to cross-examine the bailiff as to the contents of the copy, without producing it, but was not allowed to do so.

*Held*, that the bailiff's return was good. Art. 78, C. C., only requires a return that he has served a copy; and the words "duly certified" are superfluous.

*Held*, also, that counsel could not cross-examine the bailiff as to the contents of the copy served without producing it or laying a foundation for secondary evidence.

Judgment of the Court below affirmed.

*Foran*, Q.C., and *Ferguson*, Q.C., for the appellant.

*Choquet*, for the respondent.

NOVA SCOTIA.]

*In re* LUNENBURG DOMINION ELECTION.

KAULBACH v. SPERRY.

*Parliamentary elections—Petition—Preliminary objections—Affidavit of petitioner—Bona fides—Examination of deponent—Form of petition—Particulars—R. S. C. c. 9—54 & 55 V. c. 20, s. 3.*

By 54 & 55 V. c. 20, s. 3, amending the Controverted Elections Act, R. S. C. c. 9, an election petition must be accompanied by an affidavit of the petitioner "that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true." The petitioner in this case used the exact words of the Act in his affidavit.

*Held*, that the respondent was not entitled to examine the petitioner as to the grounds of his belief; that the Act made the deponent the judge of the reasonableness of such grounds; and that the affidavit was not part of the proof to be passed upon at the trial of the petition.

It is not necessary that the petition should be identified in the affidavit, as in the case of an exhibit. The affidavit is presented merely to comply with the statute.

It is no objection to an election petition that it is too general, no form being prescribed by the Act. Moreover the inconvenience may be obviated by particulars.

*W. B. A. Ritchie*, Q.C., for the appellant.

*Russell*, Q.C., and *Congdon*, for the respondent.

MANITOBA.]

*In re* MARQUETTE DOMINION ELECTION.

KING v. ROCHE.

*Parliamentary elections—Appeal to Supreme Court of Canada—Preliminary objections—R. S. C. c. 9, ss. 12, 50—Dismissal of petition—Affidavit of petitioner.*

A petition under the Controverted Elections Act, R. S. C. c. 9, against the return of the respondent at the election for

the House of Commons on 28rd June, 1896, was served on 30th July, and in September the petitioner was examined under s. 14 of the Act. Notice of motion was afterwards given to strike the petition off the files of the Court, on the ground that the affidavit of the petitioner was false, it having appeared from his examination that he had no knowledge of the truth or otherwise of the matters sworn to in the affidavit. The Judge who heard the motion dismissed it, holding that the matter should have come up on preliminary objections filed under s. 12 of the Act: 16 Occ. N. 361. His judgment was reversed by the full Court, and the petition struck off: 11 Man. L. R. 381, *ante* 85.

*Held*, that this Court had no jurisdiction to entertain an appeal from this decision; that under s. 50 an appeal to this Court only lies from a decision on a preliminary objection, and that means a preliminary objection filed, under s. 12, within five days from the date of service of the petition; and the appeal was quashed with costs.

*Howell*, Q.C., and *Chrysler*, Q.C., for the appellant.

*J. S. Tupper*, Q.C., for the respondent.

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*In re* WINNIPEG DOMINION ELECTION.

MACDONALD v. DAVIS.

*In re* MACDONALD DOMINION ELECTION.

BOYD v. SNIDER.

*Parliamentary elections—Petition—Preliminary objections—Status of petitioner—Proof of—List of voters—Certificate of clerk of the Crown in Chancery.*

On the hearing of preliminary objections to an election petition, in order to prove the status of the petitioner, a list of voters was offered with a certificate of the clerk of the Crown in Chancery, which, after stating that the list was a true copy of that finally revised for the district, proceeded as follows:

“And is also a true copy of the list of voters which was used at said polling division at and in relation to an election of a member of the House of Commons of Canada for the said electoral district . . . which original list of voters was

returned to me by the returning officer for said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office."

*Held*, that this was, in effect, a certificate that the list offered in evidence was a true copy of a paper returned to the clerk of the Crown by the returning officer as the very list used by the deputy returning officer at the polling district in question, and that such list remained of record in possession of such clerk. It was then a sufficient certificate of the paper offered, being a true copy of the list actually used at the election.

*Richelieu Election Case*, 21 S. C. R. 168, followed.

Judgment of the Court below, 11 Man. L. R. 398, *ante* 87, affirmed.

*J. S. Tupper*, Q.C., for the appellants.

*Howell*, Q.C., and *Chrysler*, Q.C., for the respondents.

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PRINCE EDWARD ISLAND.]

*In re* WEST PRINCE DOMINION ELECTION.

HACKETT v. LARKIN.

*Parliamentary elections—Corrupt treating—Agency—Trivial and unimportant act—54 & 55 V. c. 20, s. 19.*

During an election for the House of Commons a candidate took C., a supporter, with him in driving out to canvass a particular locality. They stopped at a house where three voters lived, and C. took a bottle of intoxicating liquor out of the waggon, and went into the woods with two of the voters, and remained some five minutes, afterwards taking the third voter into his barn, where he gave him two or three drinks out of the bottle, and urged him to vote for the candidate with him. It did not appear that the latter saw C. take out the bottle or knew it was in the waggon. The candidate having been elected, a petition was filed against his return, and he was unseated on the charge of corrupt treating by C., and acquitted on all other charges.



*Held*, that the act of C. in giving liquor to the voter in the barn and urging him to support his candidate was corrupt treating under the Elections Act.

C. was a member of a political association for a place within the electoral district supporting the candidate elected. There was no restriction on the members of the association to be confined in their work to the limits of the place for which it was formed, and the candidate admitted on the trial of the petition that he expected them to do the best they could for him generally.

*Held*, that the members of such association were agents of their candidate throughout the whole district, and C. was therefore his agent.

Though the only act of corruption of which the sitting member was found guilty was trivial and unimportant in character, he was not entitled to the benefit of 54 & 55 V. c. 20, s. 19, as he had not used every means to secure a pure election. There were circumstances attending the commission of the corrupt act by C. which should have aroused his suspicions, and he should have cautioned C. against the commission of the act. Not having done so, he had not brought himself within the terms of the above section.

*D. McCarthy*, Q.C., and *Stewart*, Q.C., for the appellant.

*Peters*, Q.C., A.-G., for the respondent.

#### NORTH-WEST TERRITORIES.]

#### *In re* WEST ASSINIBOIA DOMINION ELECTION.

#### DAVIN v. McDOUGALL.

*Parliamentary elections—Appeal to Supreme Court of Canada—Preliminary objections—Delay in filing—Order in Chambers—R. S. C. c. 9, ss. 12, 50.*

By the Controverted Elections Act, R. S. C. c. 9, s. 12, preliminary objections to an election petition must be filed within five days after the service of the petition; and by s. 50 an appeal shall lie to the Supreme Court of Canada from a judgment, rule, order or decision on such objections, the allowance of which has, or which if allowed would have, put an end to the petition.

Preliminary objections were filed with the clerk of the Court at half-past two in the afternoon on the fifth day after the petition [was served. By Jud. Ord. N. W. T., No. 6 of 1898, s. 17, s.-s. 1, the office of the clerk is to be closed at one in the afternoon during the summer vacation, comprising July and August. Richardson, J., in Chambers, on return of a summons calling upon the member elect to show cause why the objections should not be struck out or otherwise disposed of, held that the five days expired at one o'clock on the 3rd August, and that the objections were not properly filed.

*Held*, that this decision was not one on preliminary objections, nor could any disposition of the matter put an end to the petition. Consequently no appeal would lie to the Supreme Court; and the appeal was quashed with costs.

*McIntyre*, Q.C., for the appellant.

*Howell*, Q.C., and *Chrysler*, Q.C., for the respondent.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

ARMOUR, C.J.]

[12TH APRIL, 1897.

#### SORNBERGER v. CANADIAN PACIFIC R. W. CO.

*Evidence—Negligence—Bodily injuries—Exhibition to jury—Surgical testimony—Inflammatory address to jury—Absence of objection at trial—Excessive damages.*

In an action by two plaintiffs for damages for injuries sustained by them owing to the alleged negligence of the defendants, the jury awarded one \$6,500 and the other \$500.

*Held*, that it was within the discretion of the trial Judge to allow a plaintiff to exhibit to the jury his injured limb for the purpose of having the nature and extent of the damage explained to the jury.

Review of American authorities on this subject.

*Held*, also, that the trial Judge was right in rejecting evidence offered in regard to another man whose leg had been injured. It was asked that this might be exhibited on the part of the defendants as a sort of offset to the other, but the trial Judge refused to let this be done unless competent evidence was forthcoming to explain the nature of the injury which that man's leg had sustained ; and in this he was right, if indeed the evidence was admissible under any circumstances.

*Held*, as to the contention that the counsel for the plaintiffs at the trial had improperly inflamed the minds of the jurors by addressing remarks to them as to the great wealth of the defendants, etc., that objection should have been lodged by the defendants at the time the remarks were made, and the intervention of the trial Judge claimed while the alleged transgression was being committed ; and this not having been done, that the Court could not interfere upon appeal.

*Held*, lastly, as to the amount of the damages, that the Court could not interfere ; they were substantial, but the injuries were severe and caused much suffering, so that the jury were not so obviously wrong that the verdict should be disturbed.

Judgment of ARMOUR, C.J., affirmed.

*W. Nesbitt*, for the appellants.

*C. J. Holman*, for the plaintiffs.

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ROBERTSON, J.]

[2ND MARCH, 1897.

### REGINA v. BONNAR.

*Crown—Administration—Will—Probate—R. S. O. c. 59.*

Where a person possessed of real and personal estate dies leaving no known relatives within the Province, the Attorney-General, on behalf of Her Majesty, may maintain an action to set aside letters probate of that person's will, executed without mental capacity, and in that action may obtain an order for possession of the real estate, but a grant of administration should be obtained by a separate proceeding.

Such an action under the statute R. S. O. c. 59 is not for the purpose of escheating, but to protect the property for the benefit of those who may be entitled.

Judgment of ROBERTSON, J., affirmed.

*E. F. B. Johnston, Q.C., and A. B. Armstrong, for the appellant.*

*Watson, Q.C., and Raney, for the Crown.*

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[SURRE. COURT, STORMONT, D., & G.]

*In re* WILSON, TRUSTS CORPORATION OF ONTARIO  
v. IRVINE.

*Appeal—Surrogate Court—Time—Security—Deposit of cheque—Affidavit—  
R. S. O. c. 50, s. 33—Surrogate Rule 57.*

The plaintiffs, desiring to appeal to the Court of Appeal from an order of the Judge of a Surrogate Court made on the 4th October, 1895, served notice of appeal on the fifteenth day thereafter, and on the same day deposited with the registrar of the Surrogate Court as security a cheque for \$100, payable to the order of the registrar. The cheque was not marked by the bank, and was not cashed or presented for payment by the registrar, who simply retained it in the office. No other security was given, and no affidavit of the amount of the property to be affected by the order was filed.

*Held*, that what was done was not such a compliance with the requirements of Rule 57 of the Surrogate Rules of 1892 that the appeal was thereby lodged and brought within fifteen days, as required by s. 33 of the Surrogate Courts Act, R. S. O. c. 50; and the appeal was quashed with costs.

*D. W. Saunders, for the plaintiffs.*

*DuVernet, for the defendant.*

## HIGH COURT OF JUSTICE.

[GALT, C.J., ROSE, J., MACMAHON, J., 27TH JUNE, 1891.]

## HALLENDAL v. HILLMAN.

*Life insurance—Assignment of policies to creditor—Absolute sale—Rights under assignment—Conditions imposed by company.*

Two policies of life insurance were assigned by the assured to the defendant. The contract was one of absolute sale of the assured's interest and rights under the policies, the assignment was absolute in form, and the defendant had made actual money advances to the assured upon the security of the assignment. A condition was imposed by the insurance company that a legal insurable interest must be shown by all claimants at the time of claim thereunder, and that claims by any creditor or assignee should not exceed the amount of the actual *bond fide* indebtedness of the assured to the claimant. This condition was attached to the assignment of one of the policies. When the defendant agreed to buy the other, a new policy was issued to him as a creditor, and the condition, in addition to the words above set out, contained the provision "that this certificate or policy of insurance as to all amounts in excess thereof shall be void."

Upon this action being brought by the administrator of the estate of the assured against the company and the defendant to recover the balance of the insurance moneys after payment of the amounts advanced by the defendant, the company paid into Court the amount of the insurance and declined to raise any question as to their liability, and an order was thereupon made striking their name out of the proceedings and discharging them from liability to the plaintiff or defendant.

*Held*, that the conditions were available only at the instance of the company, and did not limit the contract or the effect thereof as between the assured and the defendant; and the latter was entitled to the whole of the insurance moneys.

*Vezina v. New York Life Ins. Co.*, 6 S. C. R. 80, *Worthington v. Curtis*, 1 Ch. D. 419, and *Dalby v. India and London Life Assurance Co.*, 15 C. B. 865, specially referred to.

Judgment of MEREDITH, J., reversed.

*A. G. Browning*, for the plaintiff.

*Watson*, Q.C., and *Latchford*, for the defendant.

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[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 1ST MARCH, 1897.]

MERCHANTS' BANK v. HENDERSON.

*Promissory note—Payment at particular place—Presentment—Time—Waiver.*

When a promissory note is made payable at a particular place, it is the duty of the maker to have the funds necessary to answer the note at such particular place, and to keep them there until they are called for by the holder of the note.

The plaintiffs, the holders of a promissory note payable at a particular place, obtained a waiver of protest from the indorser, without presentment at the place named.

In an action on the note against the maker, although it was shown that at the date the note matured there were sufficient funds at the place named, a banker's office, to meet the note, as well as at the time the banker failed, still, as sufficient funds had not been kept there all the time until presentment, the plaintiffs were entitled to judgment.

Judgment of the 1st Division Court in the county of Frontenac affirmed.

*E. H. Smythe*, Q.C., for the defendant.

*Britton*, Q.C., for the plaintiffs.

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[8TH MARCH, 1897.]

STRUTHERS v. MACKENZIE.

*Company—Purchase of goods on credit—Statutory inability to buy on credit—Acceptance of draft in name of company—Implied representation of authority at law—R. S. O. c. 166, s. 13.*

The plaintiffs sued the manager, treasurer, and directors of a co-operative association for the price of goods supplied to the association on credit. The association was incorporated under R. S. O. c. 166, by s. 13 of which it was prohibited from buying

goods on credit. The plaintiffs rested their case on an implied representation or warranty by the defendants of the authority of the association to purchase the goods on credit.

*Held*, that the plaintiffs could not recover, as no action could be maintained upon an implied representation or warranty of authority in law to do an act, but only upon an implied representation or warranty of authority in fact to do it; and moreover the plaintiffs must be taken to have known of the statutory inability.

*Held*, also, that although the goods were sold by the association, and the proceeds applied to relieve the defendants from a personal liability under which they were for the price of other goods purchased by the association, yet, as the defendants did not themselves benefit by the purchase of the plaintiffs' goods, the plaintiffs could not recover on this ground.

*Held*, lastly, that though one of the defendants accepted drafts of the plaintiffs drawn on the association, for the association, this defendant was nevertheless not liable upon the implied representation or warranty of authority of the association to accept such drafts, because this too was on a point of law.

*Gibbons, Q.C.*, for the plaintiffs.

*W. J. Hanna*, for the defendants.

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[11TH MARCH, 1897.]

### ELMSLEY v. HARRISON.

*Amendment—Pleading—New case made at the trial—Statute of Frauds.*

In an action by a lessor against an assignee of the lease, brought after the expiry of the lease, to recover possession of the demised premises and for cancellation of the lease and for relief from any claim of the defendant for renewal under a covenant in that behalf, the defendant set up in his defence the covenant to renew, and alleged that he and the plaintiff had never been able to agree upon a new rent, but that he had always been ready and willing to have it fixed by arbitration, as required by the lease, and had since action notified the plaintiff of the appointment of an arbitrator. In reply the plaintiff alleged that the defendant had made a written offer to renew

at a named rental ; that the plaintiff had accepted the offer ; but that the defendant had not carried out the arrangement so made. There was no further pleading. At the trial the evidence showed a written offer made by the defendant, but only a conditional acceptance by the plaintiff, who, however, gave uncontradicted evidence of a subsequent verbal renewal by the defendant and acceptance by the plaintiff of the terms of the former written offer.

*Held*, FALCONBRIDGE, J., dissenting, that by the conditional acceptance of the written offer, it was in effect refused, and had ceased to exist when the subsequent verbal agreement was made ; it was not necessary for the defendant to plead the Statute of Frauds in rejoinder to the reply, as he was able to show that his offer had been refused ; and when the plaintiff was allowed at the trial to give evidence of a subsequent renewal by parol of the terms of the lapsed written offer, the defendant should have been allowed to set up the Statute of Frauds ; upon which he was entitled to succeed.

Judgment of MEREDITH, C.J., reversed.

*E. T. English*, for the plaintiffs.

*E. D. Armour*, Q.C., for the defendant Harrison.

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[5TH APRIL, 1897.]

### DAVIS v. OTTAWA ELECTRIC R. W. CO.

*Street railways—Ejection of passenger—Misconduct.*

Motion by the defendants to set aside the verdict and judgment for the plaintiff for \$200 in an action tried with a jury in the County Court of Carleton, and to dismiss the action or for a new trial.

The plaintiff was ejected from a street car of the defendants in which he was a passenger, and brought this action to recover damages for his ejection.

The conductor who ejected the plaintiff did so because he refused to take his feet off the seat when requested to do so, and because he used bad language when so requested.



*Held*, that the conductor had, upon the undisputed facts, a right to eject the plaintiff for the misconduct stated; the case should not have been allowed to go to the jury; and the action should be dismissed with costs.

*W. M. Douglas*, for the defendants.

*Aylesworth, Q.C.*, for the plaintiff.

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[6TH APRIL, 1897.]

*In re* HILL v. HICKS.

*Prohibition—Division Court—Territorial jurisdiction—Necessity for application to transfer case—Bailiff.*

An appeal by the plaintiff from the order of FERGUSON, J., in Chambers, *ante* 86, granting prohibition to the 4th Division Court in the united counties of Leeds and Grenville.

*J. E. Jones*, for the appellant, contended that the defendants should have applied to have the case transferred to another Division Court, citing *Re Thompson v. Hay*, 22 O. R. 588, 20 A. R. 879.

*W. H. Blake*, for the defendants, contra.

THE COURT, without expressing any opinion upon the point decided by FERGUSON, J., held that the plaint was properly cognizable in a Division Court, and could have been brought in the Court of which the defendant Hicks was a bailiff; that, before moving for prohibition, the defendants should have applied to have the plaint transferred to that Court; and that until after such an application had been made a motion for prohibition would not lie.

The appeal was allowed with costs and the motion for prohibition dismissed with costs.

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[7TH APRIL, 1897.]

CANTELON v. THOMPSON.

*County Court appeal—Order directing new trial—Law Courts Act, 1895, s. 44 (1), clause 4—"Judgment."*

The plaintiff appealed to a Divisional Court of the High Court from an order of a County Court, in term, made upon the

defendants' application, setting aside the verdict in his favour at the trial and directing a new trial.

*Held*, that the appeal lay.

The word "judgment" in clause 4 of s. 44 (1) of the Law Courts Act, 1895, means "decision," and includes such an order; *FALCONBRIDGE, J., dubitante*.

*D. Armour and McEvoy*, for the plaintiff.

*Shepley, Q.C.*, for the defendants.

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[8TH APRIL, 1897.]

### O'DONNELL v. GUINANE.

*County Court appeal—Order setting aside judgment on terms—Finality of.*

In a County Court action the defendant made a motion to set aside a judgment by default as irregular, but the Judge held it regular, and, while he set aside the judgment, he did so upon terms of the defendant paying costs. The defendant appealed from this order upon the ground that the judgment should have been set aside unconditionally.

*Held*, that the order was not "in its nature final," within the meaning of s. 42 of the County Courts Act, R. S. O. c. 47, and the appeal did not lie.

*W. J. Clark*, for the plaintiff.

*Boland*, for the defendant John Guinane.

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### RYAN v. SHIELDS.

*Chattel mortgage—After-acquired goods—Description—Change of place of business.*

An appeal by A. G. Clements, claimant in an interpleader issue tried in the 10th Division Court in the county of York, from an order of the second junior Judge of the County Court dismissing a motion for a new trial of the issue, which had been determined in favour of the execution creditors.

The appellant's claim was under a chattel mortgage with the following description: "All and singular the stock-in-trade

and fixtures now contained in the store premises hereinafter mentioned and known as number 880 Queen street west, Toronto, and all additions thereto or substitutions thereof hereafter at any time made by the said mortgagor or any one on her behalf."

The learned Judge in the Division Court held, following *Milligan v. Sutherland*, 27 O. R. 235, 16 Occ. N. 108, that the description covered only goods which might thereafter be brought on the premises 880 Queen street west; and, it being admitted that some of the goods seized were bought after the execution debtor had moved from 880 Queen street west to other premises, the claimant could not hold these as against the execution creditors.

*F. C. Cooke*, for the appellant.

*A. C. McMaster*, for the execution creditors.

THE COURT dismissed the appeal with costs, agreeing with the judgment below.

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[MEREDITH, C.J., ROSE, J., MACMAHON, J., 14TH APRIL, 1897.]

### KREH v. BISHOP.

*Partnership—Division of gross receipts—Employment of servants.*

An appeal by the defendant Puddicombe from the judgment of FALCONBRIDGE, J., who tried the action without a jury at Berlin, in favour of the plaintiff as against both defendants. The plaintiff sued for wages as a groom employed in a livery stable. He was employed by the defendant Bishop, but brought the action against both the defendants, alleging that the defendant Puddicombe was a partner of Bishop in the livery stable business.

The trial Judge held that there was no partnership in fact, but that the defendant Puddicombe had held himself out to the plaintiff as a partner in the business, and was liable to the plaintiff, and he gave judgment for \$211 and full costs.

*W. R. Riddell*, for the appellant, contended that there was no actual partnership, and that a sharing of gross receipts was not evidence of a partnership.

*W. M. Douglas*, for the plaintiff, contended that the defendants were in law partners, or that the defendant Bishop was the agent of the defendant Puddicombe.

*Per CURIAM*—This was a case in which the defendant Puddicombe had the property and gave it to be used for the purposes of the business by the defendant Bishop, who was to employ the labour, and there was to be a division of a portion of the gross receipts. The essence of a partnership is that it is a joint venture from which profits are expected to be derived, with an agreement to apportion such profits. This was not a partnership.

Appeal allowed with costs, and action dismissed as against defendant Puddicombe with costs.

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[FERGUSON, J., 27TH FEBRUARY, 1897.]

### CHISHOLM v. LONDON AND WESTERN TRUSTS CO.

*Will—Construction—Devise—Restriction upon alienation—Validity of.*

A testator, after devising two parcels of land to his two sons, provided as follows :—" I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of ten years from the date of my decease. And further I will that the same parcels of land shall remain free from all incumbrances and that no debts contracted by my sons W. C. and H. C. shall by any means incumber the same during twenty-five years from the date of my decease."

*Held*, a good and valid restriction, so far as it was a restriction against selling and conveying the lands or incumbering them by way of mortgage.

Decisions of our own Courts followed in preference to English cases.

Hypothetical question not answered.

*A. B. Cox*, for the plaintiff.

*M. D. Fraser*, for the defendants.

[2ND APRIL, 1897.]

## WIGLE v. VILLAGE OF KINGSVILLE.

*Municipal corporations — Contract — Necessity for by-law — Resolution of council — Consolidated Municipal Act, 1892, ss. 282, 288.*

A by-law of a village corporation authorized the raising by way of loan of a certain sum for the purpose of mining and supplying the village with natural gas, and the issue of debenture therefor.

*Held*, having regard to s. 282 of the Consolidated Municipal Act, 1892, that a by-law was necessary to authorize the making of a contract for the mining work to be done, and that this by-law did not authorize it.

*Held*, also, that a resolution of the council, though entered in the minute book, and containing the contract at full length, and having the seal of the corporation attached to it, could not be considered a by-law, because it was not signed as required by s. 288.

*E. S. Wigle*, for the plaintiff.

*A. H. Clarke*, for the defendants.

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[ROSE, J., 26TH AUGUST, 1895.]

## NEWSOME v. COUNTY OF OXFORD.

*Municipal corporations — Equipment of Courts of Justice — Offices — "Furniture" — Stationery — Liability — Authority — County council — R. S. O. c. 184, ss. 466, 470.*

By s. 466 of the Municipal Act, R. S. O. c. 184, it was enacted that the county council shall "provide proper offices, together with fuel, light, and furniture, for all officers connected with" the Courts of Justice, etc.

*Held*, that "furniture" must include everything necessary for the furnishing of the offices referred to in the enactment for the purpose of transacting such business as might properly be done in such offices; and the word therefore included stationery and printed forms in use in the Courts.

*Ex p. Turquand*, 14 Q. B. D. 643, followed.

*Held*, also, upon the facts of this case, that a local officer of the Courts, who had ordered supplies of stationery and forms from the plaintiffs for his office, was duly authorized by the defendants' council to do so, pursuant to the provisions of s. 470 of R. S. O. c. 184.

*Fullerton*, Q.C., for the plaintiffs.

*Osler*, Q.C., for the defendants.

[In the Consolidated Municipal Act, 1892, s. 466 has been amended by inserting the word "stationery" before "furniture" in an earlier part of the section; but the part above quoted has not been altered.]

[31ST MARCH, 1897.]

### BRILLINGER v. AMBLER.

*Landlord and tenant--Distress for rent--Set-off--Notice--Illegal distress--Double value--R. S. O. c. 143, s. 29--2 W. & M., sess. 1, c. 5, s. 5.*

Where, after goods of the tenant had been seized by the landlord as a distress for rent, a notice of set-off was given by the tenant, pursuant to R. S. O. c. 143, s. 29, but the landlord continued in possession and sold the goods:—

*Held*, in an action for illegal distress, in which it was found that the tenant was entitled to set off a debt in excess of the rent due, that he was not entitled to recover double the value of the goods under 2 W. & M., sess. 1, c. 5, s. 5; for, under that enactment, the seizure must be unlawful as well as the sale; and here the distress when made was not unlawful, the landlord becoming a trespasser only when he remained in possession after the notice.

*Strathy*, Q.C., for the plaintiff.

*H. Lennox*, for the defendant.

[MACMAHON, J., 15TH MARCH, 1897.]

### HULL v. STEVENSON.

*Mortgage for purchase money--Covenant against incumbrances--Claim under prior mortgage--Set-off.*

Denne sold land to Stevenson, who gave a mortgage back

for part of the purchase money. Stevenson then sold and conveyed part of the land to Hull, covenanting against incumbrances, and Hull gave him back a mortgage for the purchase money, which mortgage Stevenson assigned to Daubuz. Neither Hull nor Daubuz searched the registry office, and had no actual notice of the existence of the prior mortgage from Stevenson to Denne.

*Held*, that Hull had no right to have any sum that he might be forced to pay in respect of the mortgage to Denne set off against the amount of his mortgage to Stevenson now held by Daubuz.

*W. Nesbitt and R. R. Hall*, for the plaintiff.

*Moss, Q.C., and S. S. Smith*, for the defendants the Midland Loan and Savings Company.

*Watson, Q.C., and W. H. Moore*, for the defendants Hague and Daubuz.

*Poussette, Q.C.*, for the defendant Douglas.

*W. A. F. Campbell*, for the defendant Macdonell.

*L. M. Hayes*, for the defendants the Bank of Montreal.

*R. M. Dennistoun*, for the defendant Stevenson.

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## IN CHAMBERS.

[MEREDITH, C.J., 5TH APRIL, 1897.]

### DICKERSON v. RADCLIFFE.

*Action—Defamation—Trade-libel—Action on the case—Trial by jury—Judicature Act, 1895, s. 109.*

An action for words written and published relating to articles of the plaintiffs' manufacture and the rights of the plaintiffs under certain letters patent by virtue of which they claimed a monopoly of the manufacture and sale of the articles, is not an action of defamation properly so-called, but an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiffs, and does not come within s. 109 of the Judicature Act, 1895, so as to be triable only by a jury, unless by consent.

*J. Bicknell*, for the plaintiffs.

*J. B. Holden*, for the defendants.

[7TH APRIL, 1897.]

## ROBINSON v. SUGARMAN.

*Action—Defamation—Trade-libel—Action on the case—Pleading—Particulars—Slander—Examination of party.*

The plaintiff, a tradesman, claimed damages for injury to his credit and business by reason of the defendant having sent certain hand-bills issued by the plaintiff advertising his business to various wholesale creditors of the plaintiff, and having written and published letters to such creditors falsely and maliciously charging that the plaintiff was advertising his business and unduly forcing sales with the view of selling and disposing of his goods to defeat and defraud his creditors.

*Held*, that the action was for libel, and not in case for disturbing the plaintiff in his calling, and the defendant was entitled to have words of the alleged libel set out in the pleading.

*Flood v. Jackson*, [1895] 2 Q. B. 21, and *Riding v. Smith*, 1 Ex. D. 91, specially referred to.

The plaintiff also alleged that at a certain city, in a certain month and year, the defendant falsely and maliciously spoke and published of the plaintiff certain specified words.

*Held*, that the defendant was entitled to some particulars as to the times when and the places where the defamatory words were used, and as to some of the persons in whose hearing they were alleged to have been spoken.

*Winnett v. Appelbe*, 16 P. R. 57, distinguished.

*Held*, also, that the plaintiff, before delivering particulars, should have leave to examine the defendant in order to enable him to furnish them.

*W. M. Douglas*, for the plaintiff.

*W. H. P. Clement*, for the defendant.

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[9TH APRIL, 1897.]

## CAUGHELL v. BROWER.

*Security for costs—Rule 1243—"Proceeding for the same cause"—Award—Motion to set aside—Appeal—Action—Matters not included in award.*

The word "proceeding" in Rule 1243 means a proceeding in Court.



An appeal from an order dismissing a motion to set aside an award made upon a voluntary submission is not a "proceeding for the same cause," within the meaning of Rule 1248, as an action to recover moneys in respect of certain matters included in the submission, but not dealt with by the award; and, although the costs of such appeal are unpaid, security for costs of the action will not be ordered.

*J. M. Glenn*, for the plaintiff.

*D. Armour*, for the defendant.

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[ROSE, J., 30TH MARCH, 1897.]

REGINA *ex rel.* WATTERWORTH v. BUCHANAN AND  
CUTHBERT.

*Municipal elections—Deputy returning officer—Absence during part of polling day—Irregularity—Saving clause—Consolidated Municipal Act, 1892, s. 175.*

At an election of county councillors, one of the deputy returning officers for a town in the county was absent from his booth on three separate occasions during polling day. There was no suggestion of bad faith. The first and second absences were on account of illness; on the third occasion he went out to dinner and voted in another place. The first absence was for about ten minutes, during which the booth was locked up, with the poll clerk and constable inside, in charge. The deputy swore that no voter came in till he returned. In his second and third absences the town clerk took his place. During the second no votes were cast, but during the third there were several. The town clerk placed the deputy's initials on the back of the ballots given to such voters, and the consequence was that these ballots were upon a judicial investigation identified and separated, and it appeared that during the third absence nine votes were cast for the relator and nine for the respondent. Upon the whole, the respondent had two more votes than the relator, and by s. 18 of the County Councils Act, 1896, there being two county councillors to be elected, a voter could give both his votes to one candidate.

*Held*, that the absences and what was done during the absences did not affect the result of the election, and applying

the saving provisions of s. 175 of the Consolidated Municipal Act, 1892, that it should not be declared invalid.

*W. T. McMullen*, for the relator.

*Aylesworth*, Q.C., for the respondent Buchanan.

[5TH APRIL, 1897.]

### LEYBURN v. KNOKE.

*Notice of trial—Jury sittings—Non-jury sittings—Default—Judicature Act, 1895, s. 88—Rule 647.*

Where an action is to be tried without a jury, and two spring or autumn sittings have been appointed at the place of trial, one for the trial of actions with a jury and the other without a jury, the plaintiff, although by s. 88 of the Judicature Act, 1895, he can have his action tried at the jury sittings, is not in default under Rule 647 by reason of his not giving notice of trial therefor, where the non-jury sittings, for which he intends to give notice of trial, is to be held at a later date.

*D. L. McCarthy*, for the plaintiff.

*R. Hodge*, for the defendant.

[FALCONBRIDGE, J., 12TH APRIL, 1897.]

### McLEAN v. McLEAN.

*Pleading—Statement of claim—Matters arising pending action—Joinder of causes of action—Recovery of land—Assignment of dower—Leave—Rule 341.*

A plaintiff cannot set up in his statement of claim matters arising pending the action.

An action for assignment of dower is an action for the recovery of land.

*McCulloch v. McCulloch*, 4 C. L. T. 252, followed.

Where leave is necessary, under Rule 341, to join other causes of action with an action for the recovery of land, it must be obtained before the writ of summons is issued, unless under very exceptional circumstances.

*W. H. P. Clement*, for the plaintiff.

*F. A. Anglin*, for the defendants.

## NEW BRUNSWICK.

## In the Supreme Court.

## IN CHAMBERS.

[TUCK, C.J., 16TH MARCH, 1897.]

*Ex parte* LOZIER.*In re* IRA CORNWALL CO. (LTD.)*Company—Winding-up—Attorney signing petition.*

*Held*, that a petition under the Winding-up Act, R. S. C. c. 129, must be signed by the petitioner himself in person, and not by his attorney.

*C. A. Macdonald*, for the petitioner.

*J. J. Porter*, contra.

## In the County Court.

## IN CHAMBERS.

[FORBES, J.C.C., 19TH MARCH, 1897.]

DALEY v. HOWISENSKI.

*Justice's Civil Court—Capias—Jurisdiction—Particulars of demand—Indorsement—Service.*

On review from the Justice's Civil Court of the parish of Simonds :—

*Held*, (1) that, in an action in a Justice's Civil Court, a copy of the plaintiff's particulars of demand must be attached to the copy of the capias and served on the defendant; and (2) that the amount of the debt and costs must be indorsed on the copy of the capias served on the defendant.

*Semble*, that a Justice's Civil Court of the parish of Simonds, in the city and county of Saint John, has jurisdiction to issue a capias and have it served on a defendant within the city of Saint John.

*E. R. Chapman*, for the defendant.

[23RD MARCH, 1897.]

## MOLLISON v. HOFFMAN.

*Pleading—Declaration—Striking out—Particulars.*

This was an application on the part of the defendants to strike out certain counts for work and labour, money lent, money paid, money had and received, interest, and account stated, \$400, in the plaintiffs' writ and declaration, to which there were no particulars, unless particulars should be given forthwith.

*Held*, that particulars must be given within three days or the counts would be struck out as moved. The order was made with costs.

*A. H. Hannington*, Q.C., for the plaintiffs.

*Scott E. Morrill*, for the defendants.

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 MANITOBA.
 

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## In the Queen's Bench.

[DUBUC, J., 31ST MARCH, 1897.]

## DOUGLAS v. MANN.

*Discovery—Partnership—Production of documents—Refusal of, by one partner—Partnership accounts—Amendment of statement of defence.*

The plaintiff sued on a promissory note and for the price of goods supplied.

At the trial the defendants' counsel applied to amend the statement of defence by adding an allegation that the plaintiff and defendants were in partnership in working a skating rink, and that when they dissolved partnership an account was taken by which it was shown that the plaintiff was indebted to the defendants.

The plaintiff's counsel objected to the amendment, on the ground that the defendants, on an order being made for production of the books of the partnership, had not produced them, and the plaintiff had been refused access to them, and there was nothing in the statement of defence or the counterclaim under which the investigation could be gone into. The defendant Mann made an affidavit on production, in which he stated that

he had in his possession or power no document relating to the matters in dispute in the case. The plaintiff was refused access to the books ; they were in possession of a son of the assignee, who took them when the defendants went into insolvency, and the defendants had access to them and examined them before the trial.

*Held*, that the amendment should not be allowed, and the partnership accounts could not be gone into in this action. If the defendants thought they had a *bona fide* claim against the plaintiff in respect of the skating rink partnership, they might file a statement of claim in an independent action and have an investigation into the whole dealings had between them.

*Martens v. Haigh*, 11 W. R. 792, followed.

*Coldwell*, Q.C., for the plaintiff.

*A. D. Cameron*, for the defendants.

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[KILLAM, J., 7TH APRIL, 1897.]

*In re* BAIN AND CHAMBERS.

*Mortgage—Tax sale—Surplus moneys—Right to—Mortgagor and mortgagee—Opening up foreclosure proceedings—Statute of Limitations.*

Application to settle the right to the surplus proceeds of land sold for municipal taxes, which were claimed by the representative of an assignee of a mortgage of the land, and also by the assignee of the equity of redemption.

The last instalment of the money secured by the mortgage fell due upon the 23rd December, 1885, and nothing was ever paid upon it. The assignee, in his lifetime, recovered judgment against the mortgagor upon a covenant for payment contained in the mortgage. Subsequently his personal representative filed a bill of foreclosure against the mortgagor, and on 2nd March, 1887, obtained by consent a decree of absolute foreclosure ; but, after this decree, he renewed and replaced in the sheriff's hands a writ of *fi. fa.* issued upon the judgment mentioned.

The land was sold for taxes in 1888, and the moneys in question were paid by the purchaser, in November, 1890.

After 23rd December, 1895, more than ten years after maturity of the last instalment of the mortgage money, the assignee of the equity of redemption applied to the District

Registrar for an order for payment of the money to him, and, his application being opposed by the representative of the assignee of the mortgage, the District Registrar ordered the money to be paid into Court under 55 V. c. 26, s. 8.

The contention of the assignee of the equity of redemption was that by the renewal of the *fi. fa.* the decree of foreclosure was *ipso facto* opened up, and that on 23rd December, 1895, all right of the holder of the mortgage to the land, and to the moneys as representing the land, was barred by the Real Property Limitation Act, R. S. M. c. 89, s. 4. It was urged that the foreclosure suit was at an end, or, if not, that any right to continue it and to get a new decree or order of foreclosure could have no effect outside of the suit itself, and that the period of limitation which had begun to run before the sale for taxes should be deemed to continue to run as to the proceeds.

The holder of the mortgage claimed that the renewal of the *fi. fa.* had no effect, or, if it had, that the foreclosure suit was still in existence, and operated to support the title to the land and to the money as against the holder of the equity of redemption; also, that the statute gave the right to apply for the money to the person who, at the expiration of the time for redemption from the tax sale, held an incumbrance on the land, furnishing a new point of departure and operating to bring to an end the running of the period fixed by the Statute of Limitations.

*Held*, that the renewal of the *fi. fa.* was an attempt to enforce the personal remedy, which operated to open up the foreclosure proceedings, and gave to the mortgagor or his assignee a new right to redeem. Under the statute it is the possession of an interest in the land which determines the title to the money at the time of its payment. So long as a mortgagee retains a right to recover the land as against the holder of the equity of redemption, or to continue successfully a suit or action for such recovery, which was pending when the proceeds were paid to the municipal treasurer, such mortgagee would be entitled to the proceeds to the extent of the unpaid mortgage debt.

If there had been no sale, the mortgagee could still proceed for foreclosure, and he must still be entitled to the proceeds of the land. The money should, therefore, be paid to him.

*Perdue*, for the applicant.

*Phippen*, contra.

## Supreme Court of Canada.

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NEW BRUNSWICK.]

[25TH MARCH, 1897.]

JONES v. McKEAN.

*Trusts and trustees—Account of trust funds—Abandonment by cestui que trust—Evidence—Interest.*

The holder of two insurance policies, one in the Providence Washington Insurance Company, and the other in the Delaware Mutual Insurance Company, upon which actions were pending, assigned the same to M. as security for advances, and authorized him to proceed with the actions and collect the moneys paid by the insurance companies therein. By a subsequent assignment J. became entitled to the balance of the insurance moneys after M.'s claim was paid. The actions resulted in the policy of the Providence Washington being paid in full to the solicitor of M.; but, owing to a defect in the other policy, the plaintiff in the action thereon was nonsuited.

In 1886 M. wrote to J. informing him that a suit in equity had been instituted against the Delaware Mutual Insurance Company and their agent for reformation of the policy and payment of the sum insured, and requesting him to give security for costs in such suit, pursuant to a Judge's order therefor. J. replied that, as he had not been consulted in the matter, and considered the success of the suit problematical, he would not give security, and forbade M. employing the trust funds in its prosecution. M. wrote again saying, "as I understand it, as far as you are concerned, you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings," to which J. made no reply. The solicitor for M. provided the security and proceeded with the suit, which was eventually compromised by the company paying somewhat less than half the amount of the policy.

Before the above letters were written J. had brought suit against M. for an account of the funds received under the assignment, and in 1887, more than a year after they were written, a decree was made in such suit referring it to a referee to take an account of trust funds received by M., or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to J., and the acceptance thereof. On the taking of such account M. claimed that all claim on the Delaware policy had been abandoned by the above correspondence, and objected to any evidence relating thereto. The referee took the evidence and charged M. with the amount received, but on exceptions by M. to his report, the same was disallowed.

*Held*, reversing the judgment of the Supreme Court of New Brunswick, that the sum paid by the Delaware Company was properly allowed by the referee; that the alleged abandonment took place before the making of the decree which it would have affected, and should have been so urged; that M., not having taken steps to have it dealt with by the decree, could not raise it on the taking of the account; and that, if open to him, the abandonment was not established, as the proceedings against the Delaware Company were carried on after it exactly as before, and the money paid by the company must be held to have been received by the solicitor as solicitor of M., and not of the original holder.

*Held*, further, that the referee, in charging M. with interest on money received from the date of receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to the same fixed date, had not proceeded upon a wrong principle.

*Earle*, Q.C., and *McKean*, for the appellant.

*Palmer*, Q.C., for the respondent.

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## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

MACMAHON, J.]

[27TH APRIL, 1897.

SMITH v. MASON.

*Costs—Infants—Next friend—Costs out of estate or share.*

The plaintiffs, infants suing by a next friend, claimed against their father and the executors of a will a forfeiture by their father of his share of the testator's estate, and that they had become entitled to it. The action was occasioned by facts which, if they occurred, were done by the legatee after the testator's death. The action was successful in the High Court, but was dismissed on appeal to the Court of Appeal.

*Held*, that the costs should not be made payable out of the testator's estate, nor out of the share of the infants' father, but should be paid by the next friend, without prejudice to his claim for indemnity out of the shares of the infants whenever they should come into possession.

In general a next friend is in the same position as any other litigant, and receives or pays costs personally as between himself and the defendants.

*Foy*, Q.C., for the appellants, the executors.

*Ritchie*, Q.C., for the plaintiffs.

*Moss*, Q.C., for the defendant J. C. Smith.

## HIGH COURT OF JUSTICE.

[BOYD, C., ROBERTSON, J., 3RD MAY, 1897.]

*In re* SOLICITOR.

*Solicitor—Costs—Taxation—Discretion of local officer—Increased counsel fees.*

Solicitor and client taxations are distinct from party and

party taxations both as to the scope of the inquiry and as to the powers of the officer to whom the reference is made, in regard to the allowance of items. In solicitor and client taxations there is no power of intervention on the part of the taxing officer at Toronto in order to obtain an increase in amount under such items in the Tariff as 104, 145, 150, 153; but the officer charged with the reference has power to exercise the discretion recognized by the Tariff in increasing the amount chargeable for certain services ordinarily exercisable by the officer at Toronto in party and party taxations.

*W. J. Clark*, for the client.

*C. R. W. Biggar*, Q.C., for the solicitor.

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[4TH MAY, 1897.]

### SMITH v. BOYD.

#### *Particulars—Application for—Close of pleadings—Discretion.*

Particulars are ordered with reference to pleading, while examination for discovery is used to get at the knowledge of the adverse litigant; it is only in exceptional cases that particulars are ordered after the close of the pleadings.

And where, in an action by the plaintiff against his former partner and another, for conspiracy to ruin the business of the firm, the defendant partner set up the defence that the business was ruined by the wrongful withdrawals and overdrafts of the plaintiff and by his mismanagement, negligence, fraud, and embezzlement, and certain particulars were given thereunder, as to which the defendant swore that they were given with as much detail as he could command, showing how the business had been conducted and the shortages which had arisen, for which he alleged the plaintiff was responsible as the acting partner:—

*Held*, that the discretion exercised in Chambers in refusing to order further particulars, after issue joined and notice of trial given by the plaintiff, should not be interfered with.

*H. D. Gamble*, for the plaintiff.

*H. S. Osler*, for the defendant Cooper.

[BOYD, C., 20TH APRIL, 1897.]

## LEWIS v. DOERLE.

*Will—Charitable bequest—Validity of—Lands in Ontario—Foreign lands—Debts and testamentary expenses—Liability for—Realization.*

A testator, domiciled in a foreign country, died in 1891, possessed of certain lands and personal estate in that country, and also of lands in Ontario. His personal estate was insufficient to pay his debts. By his will, after specific bequests and devises, he gave the residue of his estate, real, personal, and mixed, wherever situated, to his trustees to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights, or, in case of such trusts becoming inoperative, to his heirs-at-law.

*Held*, that the devise of lands, so far as Ontario was concerned, was void and inoperative.

2. That the trustees held the lands to the use of the heir-at-law until satisfaction should be made thereout for the charges thereon of debts and testamentary expenses, and the heir-at-law was entitled to a conveyance thereafter.

3. That the Ontario lands were liable to contribute *pari passu* with the other lands for the payment of debts and testamentary expenses.

4. That the proportion chargeable on Ontario lands might be raised by sale of an adequate part, or the rents might be applied therefor.

*W. Cassels*, Q.C., for the plaintiff.

*Moss*, Q.C., for the defendants.

[29TH APRIL, 1897.]

*In re* CLEMENT AND DIXON.

*Arbitration and award—Extending time for making award—R. S. O. c. 53, s. 43—Voluntary submission—Award already made—"Good cause."*

The Court has jurisdiction under R. S. O. c. 53, s. 43, to enlarge the time for making an award upon voluntary submission after the making of the award; and it is "good cause" for so enlarging that the arbitrators themselves, pursuant to their

powers under the submission, did all they could to enlarge, but were unable at the time to get the original submission whereon to make the indorsement as to enlargement.

*J. C. Hamilton*, for Thomas Dixon.

*Aylesworth*, Q.C., and *Kilmer*, for R. B. Clement.

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[MEREDITH, C.J., 5TH MAY, 1897.]

### BOWEN v. BOWEN.

*Covenant—Payment of debts—Attempt by creditors to enforce—Trust—  
Fraudulent conveyance—Action to set aside—Evidence.*

Action by a creditor of the defendant Robert Bowen to enforce against the lands in question an alleged lien or charge thereon, or to set aside as fraudulent against creditors a conveyance made by the defendant Robert Bowen to the defendant Mary Zimmerman, his daughter, and a subsequent conveyance by her to the defendant Nelly Zimmerman, another daughter. The lien was alleged to be created by an agreement made between the defendant Bowen and the defendant Mary Zimmerman, by which she covenanted with him to pay his debts existing at the date of the agreement, one of which was the debt of the plaintiff, the covenant in the agreement being the consideration for the conveyance by the father to the daughter of the lands in question.

*Held*, that no trust for the creditors was created by the agreement between the daughter and father, and her obligation to pay the debts depended entirely upon her covenant. The creditors not being parties to the agreement, no right existed in them to enforce the covenant, and no trust was by the agreement created in respect of the defendants: *Henderson v. Killey*, 17 A. R. 456, 18 S. C. R. 699.

*Held*, also, upon the evidence, that the conveyance to the daughter Mary was made in pursuance of a family arrangement, entered into in good faith and with no intention of defeating creditors, and being made for valuable consideration, with provision for payment of all the debts of the settlor, it was not impeachable by the creditors of the father; and so as to the conveyance from Mary to Nelly.

Action dismissed without costs.

*W. M. German*, for the plaintiff.

*L. C. Raymond*, for the defendants.

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### CROSS v. DAVIDSON.

*Distress for rent—Goods in custodia legis—Division Court execution—  
Bailiff's man in charge—Voluntary withdrawal.*

Action by a bailiff of a Division Court to recover damages for the conversion by the defendant of certain goods of a man who was defendant in two Division Court actions, which goods were seized by the plaintiff under executions issued out of that Court in those actions, directed to him as bailiff of the Court. The action was based on the special property in the goods which the plaintiff asserted by reason of the seizure and his alleged possession of the goods.

*Voluntary by  
abandonment by  
man in charge*

After making the seizure, the plaintiff placed a man in charge of the goods; and the main question was as to the effect of the conduct of this man upon the plaintiff's actual possession. The defendant was landlord of the execution debtor, and, after the man in charge had left the premises, the goods in question were distrained by the defendant for arrears of rent.

*Held*, upon the evidence, that the man in charge left voluntarily and of his own motion and without any intention of returning to the premises or of resuming possession, although what he did was without the sanction of plaintiff and in violation of duty, and the plaintiff had no intention of abandoning the seizure or the possession of the goods; and therefore the goods were not in *custodia legis* at the time of the taking by the defendant under his distress.

Action dismissed with costs.

*D. O. Cameron*, for the plaintiff.

*W. Nesbitt* and *W. H. Hunter*, for the defendant.

[FALCONBRIDGE, J., 29TH MARCH, 1897.]

*In re* GOULDEN AND CITY OF OTTAWA.

*Liquor License Act—By-law limiting licenses—When to be passed—"Year"*  
—R. S. O. c. 194, s. 20.

A corporation passed a by-law on the 4th May, 1896, limiting the number of tavern licenses.

*Held*, that by the Interpretation Act, R. S. O. c. 1, s. 8, s.-s. 15, the word "year" means a calendar year; that the words "before the 1st of March in any year" in s. 20 of the Liquor License Act, R. S. O. c. 194, mean in the months of January or February in any year; that it was the intention of the enactment that the incoming council should have the responsibility of the legislation; and the by-law was quashed with costs.

*Haverson*, for the applicant.

*H. M. Mowat*, for the city corporation.

[31ST MARCH, 1897.]

*In re* SHANACY AND QUINLAN.

*Will—Restraint on alienation—Invalidity of—Title to land—Heirs-at-law.*

A testator devised real estate to two grandchildren (naming them) "their heirs and assigns forever," and provided as follows:—"And I further will and direct, and it is an express condition of this my will and testament, that none of the devisees herein . . . that is to say neither my said grandchildren nor their trustees nor the said . . . (another devisee) shall either sell or mortgage the lands hereby devised to them."

*Held*, upon a petition under the Vendor and Purchaser Act, that the restraint on alienation, being absolute and unqualified, was invalid.

*Held*, also, that if the condition were not void, the grandchildren, being the only children of the testator's deceased children, could make title as heirs-at-law.

*A. E. H. Creswicke*, for the vendors.

*G. A. Radenhurst*, for the purchaser.

[STREET, J., 20TH APRIL, 1897.]

*In re* LEAK AND CITY OF TORONTO.

*Arbitration and award—Municipal corporations—Lands injuriously affected—Interest.*

Motion by the corporation of the city of Toronto to set aside an award. The arbitrator awarded \$8,782, with interest from 16th March, 1891, to the land-owner, William Leak, for the "entering on, taking, and injuriously affecting" certain lands mentioned in the award. Upon the face of the award he did not distinguish between the sums, if any, awarded for "injuriously affecting," and those awarded for lands taken. The question was whether Leak was or was not entitled to the interest awarded to him.

*Held*, that if the amount awarded was exclusively composed of damages inflicted upon adjoining land by the raising or lowering of the street, the allowance of interest should not have been made, upon the broad ground that, in the absence of express authority, unliquidated damages of this nature do not bear interest. But *aliter* if the amount was awarded for lands taken, as in *In re Macpherson and City of Toronto*, 26 O. R. 558, 15 Occ. N. 221.

An order was made referring the award back to the arbitrator in order to have it made plain whether any part of the amount awarded, and if so what part, was for lands injuriously affected, and in order that the arbitrator might, if necessary, alter or modify the award so far as the question of interest is concerned. Costs of this motion reserved until after the further award shall be made. Such costs and the costs of the reference back should be given to the party substantially succeeding upon the question of interest.

*J. B. Clarke*, Q.C., and *W. C. Chisholm*, for the applicants.

• *F. E. Hodgins*, for William Leak.

[21ST APRIL, 1897.]

CITY OF KINGSTON v. KINGSTON, ETC., ELECTRIC  
R. W. CO.

*Contract—Enforcement of—Municipal corporations—Street railways—Running cars—Specific performance—Mandamus—Action—Injunction—Declaration of right.*

The plaintiffs wished to force the defendants to keep their cars running over the whole of their line of railway, during the whole of each year, in accordance with the terms of the agreement between them set out in the schedule to 56 V. c. 91 (O.)

*Held*, that the agreement was one of which the Court would not decree specific performance, because such a decree would necessarily direct and enforce the working of the defendants' railway under the agreement in question, in all its minutiae, for all time to come.

*Bickford v. Chatham*, 16 S. C. R. 235, followed.

*Fortescue v. Lostwithiel and Fowey R. W. Co.*, [1894] 3 Ch. 621, not followed.

2. Nor would it be expedient to grant a judgment of mandamus for the performance of a long series of continual acts involving personal service and extending over an indefinite period.

3. The prerogative writ of mandamus is not obtainable by action, but only by motion.

*Smith v. Chorley District Council*, [1897] 1 Q. B. 532, followed.

4. To grant an injunction restraining the defendants from ceasing to operate the part of their line in question would be to grant a judgment for specific performance in an indirect form.

*Davis v. Forman*, [1894] 3 Ch. 654, followed.

5. Nor was there any object in making a declaration of right under s. 52, s.-s. 5, of the Judicature Act, 1895, where the terms of the contract were plain and were confirmed by statute, and the only difficulty was that of enforcing them.

*John McIntyre*, Q.C., for the plaintiffs.

*Whiting*, for the defendants.



[4TH MAY, 1897.]

## DART v. McCULLOUGH.

*Assignments and preferences—Assignment for benefit of creditors—Action by assignor against assignee—Account.*

The plaintiff made an assignment to the defendant for the general benefit of creditors, and this action was brought, after the declaration of a first and final dividend, for the purpose of compelling the defendant to account for and divide certain other assets come to his hands and not divided.

*Held*, that the plaintiff had a right of action to compel the defendant to account to the creditors of the plaintiff for these moneys in order that his liabilities might be reduced, because he still remained personally liable to his creditors for the unpaid portion of their claims.

The defendant having misconceived to some extent his duties under the trust which he assumed, and himself become the purchaser of parts of the estate, and made a profit out of his purchases, there should be a judgment declaring that the defendant had in his hands \$140.50 which ought to be distributed at his own expense amongst the creditors, and directing payment by him upon the High Court scale of the general costs of the action, so far as it was successful. The costs incurred by the defendant in meeting a number of charges upon which the plaintiff failed should be allowed the defendant as a set-off against costs taxable to the plaintiff.

*Clute, Q.C., and W. S. Morden, for the plaintiff.*

*Northrup and G. E. Deroche, for the defendant.*

[5TH MAY, 1897.]

## BOYD v. DOMINION COLD STORAGE CO.

*Costs—Defendant company in liquidation—Liquidator intervening—Personal order for costs.*

After the action was at issue an order was made for the winding-up of the defendant company and a liquidator was

appointed by a Court in the Province of Quebec. The plaintiff then obtained leave from that Court to proceed with this action. Afterwards the liquidator obtained an order from that Court authorizing him to intervene and defend this action in his own name as liquidator; he then applied to this Court in this action, and obtained an order that the action proceed in the name of the plaintiff as plaintiff against the company and the liquidator.

*Held*, that the liquidator, having thus intervened and made himself a party to the action, and having appeared by his counsel at the trial and contested the claim of the plaintiff, the latter, having succeeded upon his claim, was entitled to a judgment for his costs both against the company and the liquidator personally.

This Court had no authority to direct that the liquidator might reimburse himself out of the assets; that was a question for the Court in the Province of Quebec having control of the assets.

*Osler, Q.C., and Moss, Q.C., for the plaintiff.*

*George Bell, for the defendants.*

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### IN CHAMBERS.

[BOYD, C., 24TH APRIL, 1897.]

*In re GEROW v. HOGLE.*

*Prohibition—Division Court—Procedure—Issue of blank summons—R. S. O. c. 51, s. 44.*

The issue by the clerk of a Division Court of a summons with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions, though contrary to the provisions of s. 44 of the Division Courts Act, R. S. O. c. 51, does not affect the jurisdiction of the Division Court, nor afford ground for prohibition, but is a matter of practice or procedure to be dealt with by the Judge in the Division Court.

*G. H. Stephenson, for the primary debtor and garnishee.*

*DuVernet, for the primary creditor.*

[27TH APRIL, 1897.]

## CROFT v. CROFT.

*Discovery—Rule 928—Examination under—"Transfer" by judgment debtor.*

A judgment debtor had made a transfer of his property, after the debt sued for was incurred, to a mortgagee of the land of his wife, which had the effect of giving a benefit to the wife by reducing the incumbrance.

*Held*, that the judgment creditor was entitled to an order under Rule 928 for the examination of the wife as a person to whom the debtor had made a "transfer" of his property; but *quære* as to the scope of the examination.

*W. N. Ferguson*, for the judgment creditor.

*A. B. Armstrong*, for the judgment debtor.

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*In re* CLAGSTONE AND HAMMOND.

*Land Titles Act—R. S. O. c. 116, ss. 61, 131—Cautioner—"Interest"—Appointee of purchaser—"Owner"—Implied revocation of appointment.*

The provision of the Land Titles Act, R. S. O. c. 116, permitting registration of cautions against registered dealings with lands, s. 61, applies to "any person interested in any way" in the lands.

*Held*, that, as the Land Titles Act relates mainly to conveying, whatever dealing gives a valid claim to call for or receive a conveyance of land is an "interest" within the scope of the statute; and an appointee or nominee of the purchaser of an interest in lands has a *locus standi* as cautioner; and where such an appointee registered a caution as "owner," and there was no doubt of the substantial nature of his claim, his caution was supportable as against any objection in point of form, by virtue of s. 131.

*Held*, also, that an action brought by the original purchaser, after the registration of her appointee's caution and pending proceedings to set it aside, for specific performance of a contract to convey to her the interest in respect of which she had made

the appointment, did not, under the circumstances in evidence, put an end to such appointment.

*George Ross*, for the registered owner.

*Moss, Q.C.*, for the cautioner.

[1st May, 1897.]

### HUTHNANCE v. TOWNSHIP OF RALEIGH.

*Parties—Misjoinder of plaintiffs—Rule 324—Striking out—Leave to bring new actions—Ante-dating writs—Terms—Statute of Limitations.*

Upon the defendants' application, in a case of misjoinder of plaintiffs, under Rule 324, the usual order is that all proceedings be stayed till election is made as to the plaintiff who shall proceed, and that the names of the others be struck out.

But there is no power to direct that the rejected plaintiffs shall be allowed to issue writs of summons for their respective causes of action against the defendants *nunc pro tunc* as of the date when the writ in the original action was issued; there is no power to alter the date of the process.

*Clarke v. Smith*, 2 H. & N. 753, *Nazer v. Wade*, 1 B. & S. 728, and *Doyle v. Kaufman*, 8 Q. B. D. 7, 340, followed.

Nor can a term be imposed that in the new actions the defendants be restrained from setting up the Statute of Limitations.

*Smurthwaite v. Hannay*, [1894] A. C. 494, 506, specially referred to.

*H. J. Scott, Q.C.*, for the plaintiffs.

*E. D. Armour, Q.C.*, for the defendants.

[OSLER, J.A., 22ND APRIL, 1897.]

### TOOGOOD v. HINDMARSH.

*Jury notice—Striking out—Legal and equitable issues—Irregularity—Discretion.*

Where both legal and equitable issues are raised by the pleadings, a jury notice cannot be regarded as irregular.

*Baldwin v. McGuire*, 15 P. R. 805, distinguished.

Where it is apparent that an action should be tried without a jury, a Judge in Chambers will strike out the jury notice as a matter of discretion.

*L. G. McCarthy*, for the plaintiff.

*W. H. Blake*, for the defendant.

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[MEREDITH, C.J., 8RD MAY, 1897.]

*In re DUNN.*

*Money in Court—Payment out of share of absentee—Presumption of death—Peculiar circumstances.*

Application by the children of Patrick Dunn for payment out of Court of his share, amounting to about \$270, of the estate of John Dunn, deceased, Patrick having escaped in 1899 from a prison at Auburn, in the state of New York, where he was serving a life sentence, and not having since been heard of.

When the application was first made, on the 8th February, 1897, an order was made directing the publication of an advertisement asking for information as to whether Patrick was still alive, etc.

Publication having been made as directed and no answers received, the application was renewed on the 29th March, 1897.

It was then pointed out that the circumstances were not such as to clearly raise a presumption of death, but the learned Chief Justice took the motion into consideration, and now made an order for payment out to the children of Patrick as asked. One-half the fund to be paid out at once to Margaret Dunn, who was of age, and the other half to be paid out to Edward Dunn at his majority. Administration of the estate of Patrick Dunn not required, as the fund in Court was small.

*D. L. McCarthy*, for the applicants.

[5TH MAY, 1897.]

PATTERSON v. CENTRAL CANADA SAVINGS AND  
LOAN CO.

*Amendment—Pleading—New defence—Statute of Limitations.*

An appeal by the plaintiffs from an order of an official referee allowing the defendants to amend their statement of defence by setting up the Statute of Limitations as an additional defence in an action for waste brought by the plaintiffs as owners of the remainder in fee in certain lands of which the defendants were tenants for the lives of others.

*Held*, following *Williams v. Leonard*, 16 P. R. 544, 17 P. R. 78, that the Statute of Limitations being a defence permitted by law, and the real question between the parties being as to the right of the plaintiffs to recover by action the damages claimed by them, "the very right and justice of the case" demanded that the plaintiffs should not recover in this action if the statute afforded a bar to their right to do so.

*Brigham v. Smith*, 8 Ch. Chamb. R. 818, referred to, however, as laying down a more reasonable and just practice.

Appeal dismissed with costs to the defendants in any event.

*N. F. Davidson*, for the plaintiffs.

*Masten*, for the defendants.

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REGINA *ex rel.* FERRIS v. SPECK.

*Municipal elections—Village councillor—Property qualification—Leasehold—Incumbrances—55 V. c. 42, s. 73.*

Appeal by the relator from an order of the Judge of the County Court of Welland dismissing a motion to void the election of the respondent as a councillor for the village of Niagara Falls for alleged want of property qualification.

The respondent was duly rated upon the proper assessment roll as tenant of land assessed thereon for \$800, which land, with other land owned by the same landlord, which it was admitted was of the value of at least \$1,100, was incumbered by a mortgage for \$800 having priority to the respondent's lease.

The question turned upon the meaning of s. 78 of the Consolidated Municipal Act, 1892, which requires, as to the property qualification, so far as applicable to this case, that a person to be qualified to be elected must have at the time of the election, as proprietor or tenant, a legal or equitable freehold or leasehold, rated in his own name on the last revised assessment roll of the municipality, to at least the value thereafter mentioned over and above all charges, liens, and incumbrances affecting the same, such value being in the case of councillors of incorporated villages, freehold \$200, or leasehold \$400.

The County Court Judge was of opinion that the mortgage was not to be taken into account in ascertaining the value of the respondent's leasehold, as it was not a charge, lien, or incumbrance affecting it, within the meaning of s. 78.

*Held*, that this view was the correct one. What was meant was that the leasehold interest itself should be the subject of the incumbrance, where the qualifying property is a leasehold interest, that is to say, an incumbrance created by the owner of the leasehold interest, or operating upon it *qua* leasehold.

*Held*, also, that the mortgage debt should be apportioned according to the respective values of the two properties included in it, if the incumbrance were one within the provisions of s. 73: see *Moore v. Overseers of Parish of Carisbrooke*, 12 C. B. 661; *Barrow v. Buckmaster*, *ib.* 664.

Appeal dismissed with costs.

*W. M. Douglas*, for the relator.

*DuVernet*, for the respondent.

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[STREET, J., 3RD MAY, 1897.]

REGINA *ex rel.* JOANISSE v. MASON.

*Municipal elections—County councillor—Property qualification—55 V. c. 42, s. 73—Actual occupation—Partnership property—Assessment.*

An appeal by the relator from an order of Mr. Cartwright, an official referee, sitting for the Master in Chambers, dismissing a motion in the nature of a *quo warranto* to remove the respondent from the office of a county councillor for the county of Carleton, on the ground of insufficient property qualification.

By s. 14 of the County Councils Act, 1896, 59 V. c. 52, the qualification of a county councillor is the same as that of the reeve of a town.

By s. 78 (1) of the Consolidated Municipal Act, 1892, 55 V. c. 42, a person to be qualified for election as reeve of a town must have, or his wife must have, at the time of the election, as proprietor or tenant, a legal or equitable freehold or leasehold, rated in his own or his wife's name, on the last revised assessment roll, over and above all incumbrances, to at least the value of freehold \$600, or leasehold \$1,200; but, if within any municipality any such person is at the time of election in actual occupation of any such freehold, he will be entitled to be elected, if the value at which such freehold is actually rated amounts to not less than \$2,000, and for that purpose the value shall not be affected or reduced by any incumbrance.

The respondent and three other men were in partnership, and were assessed as owners of a saw-mill and adjacent land for \$7,500. The property was heavily incumbered.

*W. H. P. Clement*, for the relator, argued that the words "actual occupation" in the proviso to s. 78 meant exclusive occupation; also that it was not to be assumed that the respondent had an equal share with the others in the property.

*D. L. McCarthy*, for the respondent.

STREET, J., held that the statute did not require exclusive occupation, and the occupation by the respondent as one of the partners was sufficient, and he must be taken to be assessed for one-fourth of the \$7,500, and to be in actual occupation of his portion of it. A presumption of equality arises from the assessment: *Regina ex rel. Harding v. Bennett*, 27 O. R. 314, 16 Occ. N. 121.

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## NOVA SCOTIA.

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### In the Supreme Court.

[THE JUSTICES IN BANCO, 8TH FEBRUARY, 1897.]

### JOHNSON v. FITZGERALD.

*Writ of summons—Special indorsement—Action on guaranty—Consideration—Necessary allegations.*

An appeal by the plaintiff from a decision of a County Court Judge striking out the special indorsement of the writ of summons and dismissing the action.



The plaintiff's writ was specially indorsed as follows:—

"The plaintiff's claim is against the defendant upon a guaranty in writing of the 6th day of November, 1895, by which defendant agreed to see that plaintiff was paid \$10 per month on the following note:

Ten months after date I promise to pay to the order of Walter Johnson, one hundred dollars, payable ten dollars per month without interest, at Caledonia Corner, for value received.

Particulars.

To instalments due to 6th July, 1896.....\$80 00

By instalments paid to 6th April, 1896..... 50 00

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Amount due.....\$80 00

No instalments have been paid since 6th April, 1896, and defendant refuses to perform his guaranty. The plaintiff claims \$80."

The judgment of the Court was delivered by

MEAGHER, J.—It has always been necessary in actions on guaranties and promises made on behalf of another party, to show by allegation the consideration on which such guaranty or promise was founded, both at common law and under the Common Law Procedure Act, 1852, Schedule A, No. 4, and it is equally necessary under the Judicature Act and Rules, in England and Nova Scotia. The necessity for such an averment could only be dispensed with by a special rule. The intention of the Judicature Act in the main was not to dispense with what was necessary but to simplify procedure. If it were not necessary to set out the consideration, the defendant would be at the plaintiff's mercy, and would have no notice of what the plaintiff intended to prove. The claim or cause of action relied on should be, both as to form and material facts, so clear as to leave no room for doubt what it is. When the forms given as examples allege a consideration, or show facts constituting a consideration, for the promise sued on, and the Rules require, where the forms given do not cover the particular case, that the indorsement shall be to the effect of such forms or of a like character, there is good ground for concluding that the averment of consideration was not intended to be dispensed with by the Judicature Act: see *Millington v. Loring*, 6 Q. B. D. 194; *Walker v. Hicks*, 3 Q. B. D. 8; *In re Rica Gold Mining Co.*, 11 Ch. D. 47; *Davis v. James*, 26 Ch. D. 780.

Appeal dismissed with costs.

[WEATHERBE, J., 16TH FEBRUARY, 1897.]

## LOWTHER v. LOGAN.

*Parliamentary elections—Petition—Time for presenting—54 & 55 V. c. 20, s. 5—Last day falling on Sunday.*

At an election for the House of Commons of Canada, the polling was held on 23rd June, and the petition against the member-elect was presented on the 8rd August. By 54 & 55 V. c. 20, s. 5, it is required that where there has been a contest, the petition shall be presented within forty days after polling. The fortieth day fell on Sunday, and the petition was presented on the following day. The question as to whether the presentation was in time was raised by preliminary objection.

*Held*, that the presentation was too late. Section 7, s.-ss. 26 and 27, of the Interpretation Act relate to procedure.

*Dechene v. City of Montreal*, [1894] A. C. 640, followed.

*H. Mellish*, for the respondent.

*J. A. Chisholm*, for the petitioner.

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 IN CHAMBERS.

[WEATHERBE, J., 19TH FEBRUARY, 1897.]

## O'BRIEN v. CHRISTIE.

*Partnership—Judgment creditor—Right to payment of judgment by receiver.*

The plaintiff and defendant were both members of the firm of Christie & O'Brien, and the action was for dissolution.

The Sterling Refining Company, judgment creditors, moved for an order for payment of their judgment by the receiver, or, in the alternative, for an order making the judgment a first lien on the amount in or to come into the receiver's hands. The motion was opposed on the ground that the partnership was insolvent; that there were previous judgments against the firm unsatisfied; and that there should be an order for the equal distribution of the moneys.

*Harris*, Q.C., for the motion, relied on *Kewney v. Attrill*, 84 Ch. D. 345.

*Grant*, contra.

The motion was granted with costs.

[RITCHIE, J., 2ND APRIL, 1897.]

## HESSELEIN v. WALLACE.

*Appeal—Supreme Court of Canada—Extending time—Jurisdiction.*

The time for appealing to the Supreme Court of Canada from a decision of the Supreme Court of Nova Scotia *in banco*, dismissing an appeal of the defendant, having expired, the defendant moved to extend the time for perfecting the appeal to the Supreme Court of Canada. The motion was opposed on the ground that the Judge in Chambers had no jurisdiction so to extend the time.,

*Held*, following *Macrae v. News Printing Company of Toronto*, 26 S. C. R. 695, *ante* 76, that the application must fail for want of jurisdiction.

*J. B. Kenny*, for the application.

*J. A. Chisholm*, contra.

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NEW BRUNSWICK.

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In the Supreme Court.

IN EQUITY.

[BARKER, J., 20TH APRIL, 1897.]

## JEFFRIES v. BLAIR.

*Costs—Foreclosure suit—Offer to suffer judgment—Equity Act, 1890, s. 130.*

This was a suit for foreclosure and sale in respect of derivative mortgages. An offer to suffer judgment by default for \$480 was filed by the defendants, under s. 130 of the Equity Act, 1890. At the hearing the amount due was assessed at \$407.97. For the defendants it was now contended that they were entitled to their costs subsequent to their offer.

*Held*, that the section does not apply to a suit for foreclosure and sale of mortgaged premises, and that the plaintiffs were entitled to full costs of suit.

*White, S.-G.*, for the plaintiffs.

*Alward, Q.C.*, for the defendants.

## IN CHAMBERS.

[McLEOD, J., 18TH MARCH, 1897.]

## PRICE v. HOWE.

*Judgment—Entry of—Confession — Time — Return of summons—Jurisdiction.*

Review from the Parish of Norton Civil Court.

In this cause the defendant acknowledged his indebtedness to the plaintiff in writing upon the back of the summons at the time it was served upon him by the constable. The summons was issued on the 10th February, 1897, and returnable on the 17th February, 1897. The magistrate entered judgment, on the confession, on the 12th February, 1897, and issued execution on the same day.

*Held*, that the magistrate had no jurisdiction to enter judgment by confession before the return day of the summons.

An order was made that the judgment of the 12th February, 1897, be set aside and judgment entered as of 17th February, 1897, for the amount confessed.

*Wright v. Parlee*, 8 Pug. 381, and *Byram v. Johnston*, 29 N. B. Reps. 572, referred to.

*A. W. Baird*, for the plaintiff.

*J. W. Flower*, for the defendant.

[TUCK, C.J., 12TH APRIL, 1897.]

*Ex parte* LE BELL.*Liquor License Act—Summary conviction—Jurisdiction of Parish Court Commissioner.*

The prisoner, Charles Le Bell, was convicted and imprisoned in the county of Restigouche, before a Parish Court Commissioner, for selling liquor without a license in violation of the New Brunswick Liquor License Act, 1896.

*Held*, upon the return of a *habeas corpus*, that under s. 81 of the Act a Parish Court Commissioner has no jurisdiction to hear a prosecution.

The prisoner was discharged from custody.

An order was made exempting the sheriff and gaoler from liability.

*John Montgomery*, for the prisoner.

*H. F. McLatchy*, for the prosecution.

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### ACKERMAN v. McDOUGALL.

*Justice of the peace—Witnesses not signing evidence—Summoning jury without application.*

Review from the Parish of Chipman Civil Court.

In this cause it did not appear that the witnesses signed the evidence which they gave upon the trial; and the magistrate returned that he had summoned the jury without an application from either party. The jury found a verdict for the plaintiff.

*Held*, setting aside the judgment and ordering a nonsuit to be entered, that ss. 4 and 81 of the C. S. N. B. c. 60 are mandatory; and that the magistrate, in not reading the evidence over to the witnesses and having it signed by them, and, also, in summoning a jury without an application from either party to do so, acted contrary to the statute.

*A. A. Stockton*, Q.C., for the plaintiff.

*John R. Dunn*, for the defendant.

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### BONNELL v. WALLACE.

*City Court—Jurisdiction—Adjournment—Promissory note—Presentment—C. S. N. B. c. 60, s. 35.*

Review from the City Court of Saint John.

In this cause the defendant was arrested on a promissory note made for a debt; he gave bail, and on the 28th August, 1896 (the regular Court day of that week being the 27th August, 1896), the hearing of the cause was adjourned for four weeks; on the 24th September, 1896 (the regular Court day for that week), judgment was entered against him by default; and on the 25th September, 1896, he appeared by counsel to defend, claiming that the cause had been adjourned to that

day, but no Court was held. The note was on demand and made payable at a particular place, but it did not appear by the magistrate's return that presentment had been proved. It was submitted, however, that the C. S. N. B. c. 60, s. 35, which governs the procedure of all such Courts, had been substantially complied with.

*Held*, (1) that, under the C. S. N. B. c. 60, s. 35, where a defendant does not appear and defend, proof of presentment of a promissory note on demand, payable at a particular place, is not required; and (2) that the magistrate had no jurisdiction to enter judgment before the 25th September, 1896.

A new trial was ordered.

*M. McDonald*, for the plaintiffs.

*A. W. McRae*, for the defendant.

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## MANITOBA.

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### In the Queen's Bench.

[TAYLOR, C.J., 22ND APRIL, 1897.]

#### BODDY v. ASHDOWN.

*Bill of sale—Instrument absolute in form given as security—Concurrent agreement.*

Interpleader issue. The question was whether certain horses were at the time of the seizure the property of the plaintiff, as against the defendants, execution creditors of one Telfer.

The plaintiff claimed the horses under a bill of sale from Telfer, which the defendants had the right to attack in the issue.

The defendants contended that the bill of sale was invalid, because there was no *bona fide* sale by Telfer to the plaintiff, the transaction being one by which the horses and other things were transferred to the plaintiff by way of security only for the repayment of certain moneys; that the consideration expressed in the bill of sale was a false one; and that the affidavit made by the grantee was untrue and insufficient.

Telfer had bought land from the plaintiff, and, being unable to pay a judgment recovered for the purchase money, gave him a chattel mortgage. Default having been made, the property comprised, including the horses in question, was seized, but the seizure was afterwards abandoned and the bill of sale executed. The affidavit made by the plaintiff was the usual one, "that the sale therein made is *bona fide* and for valuable consideration," etc.

But, at the same time, there was executed an agreement between the plaintiff and Telfer and his sons containing recitals as to the chattel mortgage and bill of sale which contained the following clause: "It is hereby declared and agreed that the execution of said bill of sale is simply as security for the due repayment of . . . and not as an absolute sale of said goods and chattels. The said parties of the second part (Telfer and his sons) are to have possession of the said goods and chattels until default is made in payment of this agreement." The goods were left in the possession of Telfer, and certain payments which had been made under the agreement were all indorsed upon the bill of sale.

*Held*, that the bill of sale was void as against the defendants, execution creditors of the grantors: *Matheson v. Pollock*, 8 Brit. Col. L. R. 74; *Bathgate v. Merchants' Bank*, 5 Man. L. R. 210.

*James*, for the plaintiff.

*Cooper*, Q.C., and *D. A. Macdonald*, for the defendants.

## BRITISH COLUMBIA.

In the Supreme Court.

IN CHAMBERS.

[BOLE, L.J., 24TH APRIL, 1897.]

GORDON v. CITY OF VICTORIA.

*Parties—Action for tort—Two defendants—Uncertainty as to responsibility  
—Motion to strike out.*

Summons obtained by the defendants to stay proceedings unless and until the name of the defendants the Victoria Tramway Company should be struck out.

The action was brought against the city corporation and the tramway company to recover \$20,000 damages for the death of the plaintiff's husband on the 24th May, 1896, at Ellice Point bridge, in the city of Victoria, by the collapse of the bridge over which the deceased was travelling in a car of the tramway company.

BOLE, L.J.—Counsel relied on *Sadler v. Great Northern R. W. Co.*, [1896] A. C. 450, 453, and on the fact that the joinder of the two defendants was calculated to embarrass and prejudice the defence. In that case it was clear that there existed two separate causes of action, and that decision merely affirmed the rule that claims for damages against two or more defendants in respect of their several liabilities for separate torts cannot be combined in one action. The defendants have not shown that such is the case in the present instance; indeed, it appears to me that the question as to which of the defendants, if either, is liable, is a matter still involved in much uncertainty. There is merely one tort; the whole difficulty is as to who is responsible therefor.

*Massey v. Heynes*, 21 Q. B. D. at p. 834; *Indigo Co. v. Ogilvy*, [1891] 2 Ch. at p. 44; *Noyes v. Young*, 16 P. R. 254; *Crerar v. Holbert*, 17 P. R. 283; and the recent decision of McColl, J., in *Bowness v. City of Victoria*, referred to.

Summons discharged; costs in the cause.



## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

DIVISIONAL COURT.]

[17TH MAY, 1897.]

*In re* BRANTFORD ELECTRIC AND POWER COMPANY  
AND DRAPER.

*Landlord and tenant—"Buildings and erections"—Payment for—Fixtures  
and machinery.*

An appeal by the lessors from the judgment of a Divisional Court, 28 O. R. 40, 16 Occ. N. 346, was dismissed with costs.

*Wilkes*, Q.C., for the appellants.

*E. D. Armour*, Q.C., and *E. Sweet*, for the respondent.

BOYD, C.]

[11TH MAY, 1897.]

ROBINSON v. DUN.

*Libel—Mercantile agency—Confidential report—False information—  
Privilege.*

A mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the mercantile agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness.

Judgment of BOYD, C., 28 O. R. 21, 16 Occ. N. 349, reversed.

*W. Nesbitt* and *R. McKay*, for the appellants.

*Gibbons*, Q.C., for the respondent.

[18TH MAY, 1897.]

## CARRIQUE v. BEATY.

*Promissory note—Alteration after maturity—Signature by new maker—  
Discharge of accommodation maker.*

A promissory note made by two persons, one signing for the accommodation of the other, was, after maturity, signed by a third person.

*Held*, on the evidence, that this third person signed as an additional maker, and that there was, therefore, a material alteration of the note, discharging the accommodation maker.

Judgment of BOYD, C., 28 O. R. 175, *ante* 5, reversed.

*Snow*, for the appellant James Beaty.

*E. W. Boyd*, for the appellant John A. Beaty.

*J. W. Elliott*, for the respondent.

MEREDITH, C.J.]

[11TH MAY, 1897.]

## BAIN v. ANDERSON.

*Master and servant—Action for wrongful dismissal—Indefinite hiring—  
Temporary arrangement.*

An appeal by the defendants from the judgment of MEREDITH, C.J., 27 O. R. 369, 16 Occ. N. 148, was allowed with costs; OSLER, J.A., dissenting; the majority of the Court holding that, upon the evidence, there was no definite engagement of the plaintiff, but merely a temporary arrangement pending the reorganization of the business.

*McCarthy*, Q.C., and *S. H. Blake*, Q.C., for the appellants.

*Gibbons*, Q.C., for the respondent.

FERGUSON, J.]

## WALKER v. ALLEN.

*Devolution of Estates Act—Children of deceased brother or sister—R. S. O.  
c. 108, s. 6.*

Under s. 6 of the Devolution of Estates Act, R. S. O. c. 108, the children of a deceased brother or sister of the intestate are entitled to share *per stirpes*.

Judgment of FERGUSON, J., reversed.

*R. A. Grant and J. N. Fish*, for the appellants.

*W. L. Walsh*, for the administrators.

*W. A. J. Bell*, for the respondents.

ROBERTSON, J.]

*In re* ERMATINGER AND TILSONBURG, LAKE ERIE,  
AND PACIFIC R. W. CO.

*Trustee—Compensation—Railway company—Trustee of bonus debentures—  
R. S. O. c. 110, s. 38.*

A person to whom municipal debentures in aid of a railway company are delivered in trust to be handed over to the company upon the completion of the railway is a trustee within s. 38 of R. S. O. c. 110, and entitled to compensation.

Judgment of ROBERTSON, J., 28 O. R. 106, 16 Occ. N. 879, affirmed, but the amount of compensation reduced.

*Laidlaw, Q.C.*, and *J. Bicknell*, for the appellants.

*Moss, Q.C.*, and *D. W. Saunders*, for the respondent.

FALCONBRIDGE, J.]

ATKIN v. CITY OF HAMILTON.

*Railways—Highway crossing—Accident—Damages.*

An appeal by the defendants from the judgment of FALCONBRIDGE, J., 28 O. R. 229, *ante* 57, was allowed with costs, the Court holding that the work in question was being lawfully and necessarily done, and that there was no evidence of want of care.

*D'Arcy Tate*, for the appellants.

*John Greer*, for the respondent.

BEATY v. GREGORY.

*Church—Trustees—Covenant—Personal liability—R. S. O. c. 237.*

The duly appointed trustees of a congregation, to whom by that description the site for the church has been conveyed, and

who by that description give to the vendor to secure the purchase money a mortgage with the ordinary covenant for payment, are not personally liable upon the mortgage, although it is signed and sealed by them individually.

Judgment of FALCONBRIDGE, J., 28 O. R. 60, 16 Occ. N. 350, affirmed.

*J. B. Clarke, Q.C., and Swabey, for the appellant.*

*Moss, Q.C., and D. Urquhart, for the respondents.*

STREET, J.]

[12TH JANUARY, 1897.

### BEATON v. SPRINGER.

*Fire—Negligence—Clearing land—Setting out fire—Period of year—Liability.*

In the month of August the defendant set out fire on his own land for the purpose of clearing it. This fire continued to burn till October, when, in consequence of a very high wind, sparks were carried to the plaintiff's land, and set fire to some ties and posts stored thereon.

*Held*, that the question of the defendant's liability and negligence should be determined having regard to the circumstances existing in October and not to those existing in August.

Judgment of STREET, J., reversed.

*Lynch-Staunton, for the appellant.*

*J. W. Nesbitt, Q.C., and W. T. Evans, for the respondent.*

[11TH MAY, 1897.

### *In re* STONEHOUSE AND TOWNSHIP OF PLYMPTON.

*Drainage—Improvement of old drain—Drain extending into adjoining municipality—57 V. c. 56, s. 75.*

Under s. 75 of 57 V. c. 56 a township municipality which has constructed a drain within its own boundaries, connecting however with a drain constructed as an independent work by an adjoining municipality, has power, without the

petition of the ratepayers, to provide for the necessary repairs to both drains, and to assess the adjoining municipality with its proportion of the cost.

Judgment of STREET, J., reversed.

*Shepley, Q.C., and J. Cowan*, for the appellants.

*Aylesworth, Q.C., and Shaunessy*, for the respondent.

MEREDITH, J.]

### O'NEILL v. TOWNSHIP OF WINDHAM.

*Municipal corporations — Highways — Nuisance — Obstruction — Untravelled portion of highway.*

A municipal corporation is not responsible for damages resulting from a horse taking fright at railway ties piled, without the knowledge or authority of the corporation, on the untravelled portion of the highway, but the person piling the ties on the highway without authority is responsible.

Judgment of MEREDITH, J., reversed in part.

*Lynch-Staunton*, for the appellant Taylor.

*Slaght*, for the appellants the townships.

*T. Macbeth*, for the respondent.

DRAINAGE REFEREE.]

### SEYMOUR v. TOWNSHIP OF MAIDSTONE.

*Ditches and Watercourses Act — Municipal corporations — Damages — R. S. O. c. 220.*

A township municipality, within the limits of which a ditch is constructed under the provisions of the Ditches and Watercourses Act, in accordance with the award of the township engineer, made in assumed compliance with the requisition of the ratepayers interested, is not liable for damages caused to a resident of the township by the construction of the ditch, even though the requisition be in fact defective.

Judgment of Drainage Referee affirmed.

*F. E. Hodgins*, for the appellant.

*J. B. Rankin*, for the respondents.

## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 1ST MARCH, 1897.]

## WILSON v. MANES.

*Municipal elections—Returning officer—Ministerial duties—Refusal to deliver ballot paper to voter—Wilful act—Absence of malice or negligence—Liability—Consolidated Municipal Act, 1892, ss. 80, 168.*

The plaintiff's name was properly entered on the last revised assessment roll of a municipality as a tenant of real property of the value entitling him to vote at a municipal election under s. 80 of the Consolidated Municipal Act, 1892, and was entered on the voters' list, but, after the first revision thereof, he ceased to be the tenant and to occupy the property, though he continued to reside in the municipality, and was the owner of real property as a freeholder of the value entitling him to vote, and was such freeholder at the time of an election. At such election he demanded a ballot paper, and was willing to take the oath for freeholders, but the defendant, the returning officer, refused to furnish him with a ballot or to permit him to vote unless he took the oath required for tenants.

Held, that the defendant's duties were merely ministerial, and that an action for a breach thereof was maintainable without any proof of malice or negligence; that the plaintiff was entitled to vote at such election; and that the defendant's refusal to allow him to vote constituted a breach of his duty, and rendered him liable to the penalty of \$400 given by s. 168, and also to damages at common law.

*Aylesworth, Q.C., for the plaintiff.*

*E. R. Cameron, for the defendant.*

[BOYD, C., ROBERTSON, J., 5TH MAY, 1897.]

## FAWKES v. GRIFFIN.

*Action—Stay of—Jurisdiction—Application of stranger—Judicature Act, 1895, s. 52 (9).*

The jurisdiction to stay proceedings given by s. 52 (9) of the Judicature Act, 1895, at the instance of any person, whether a

party to the action or not, is only to be exercised where the action is an improper one, or where under the former practice the Court of Chancery might have enjoined its prosecution, and only where the stranger is one who seeks to intervene as a party and can properly be added as a party.

*Bradford*, for the plaintiff.

*W. R. Smyth*, for the intervener.

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[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 10TH MAY, 1897.]

BELAIR v. BUCHANAN.

*Security for costs—Plaintiff out of jurisdiction—Property in jurisdiction.*

The decision of FERGUSON, J., *ante* 149, was affirmed on appeal by the defendant to a Divisional Court.

*J. Bicknell*, for the appellant.

*W. Read*, for the plaintiff.

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PETRIE v. MACHAN.

*Division Court appeal—Amount in dispute—R. S. O. c. 51, s. 148.*

Appeal by the plaintiff from an order of the Judge of the County Court of Perth refusing a motion for a new trial in an action in the 2nd Division Court in that county to recover \$100 and interest upon a contract. The defendant paid \$35 into Court, and the judgment for the plaintiff was for that amount. The defendant objected that the appeal did not lie because "the sum in dispute upon the appeal" did not exceed \$100 "exclusive of costs:" s. 148 of the Division Courts Act, R. S. O. c. 51.

*Per CURIAM*:—The subject matter of the suit was one cause of action only—the breach by the defendant of an entire contract in respect of which the plaintiff claimed that he was entitled to recover \$100 and interest. The plaintiff is still claiming that sum upon appeal, and is disputing the sum of \$35 as being the proper amount recoverable for the breach of the contract, and therefore the sum of \$35 is as much in dispute

as the difference between that sum and the sum claimed by the plaintiff of \$100 and interest; and therefore the sum in dispute upon this appeal exceeds the sum of \$100 exclusive of costs, and the appeal must be heard.

*R. McKay and Gideon Grant*, for the plaintiff.

*Aylesworth*, Q.C., for the defendant.

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### REGINA v. ROBINSON.

*Criminal law—Evidence—Non-support of wife—Criminal Code, 1892, s. 210, s.-s. 2—Lawful excuse—Agreement.*

Upon an indictment of the prisoner under s. 210, s.-s. 2, of the Criminal Code, 1892, for omitting without lawful excuse to provide necessaries for his wife, evidence is admissible on behalf of the prisoner of an agreement between him and the person who became his wife, at the time of the marriage, that they were to live at their respective homes and be supported as before the marriage until the prisoner obtained a situation where he could earn sufficient for their maintenance; STREET, J., dissenting.

*J. R. Cartwright*, Q.C., for the Crown.

*F. C. Cooke*, for the prisoner.

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[18TH MAY, 1897.]

### TALBOT v. LONDON GUARANTEE AND ACCIDENT COMPANY.

*Contract—Employer's liability policy—Condition—Construction—Conduct of employer.*

An appeal by the plaintiffs from the judgment of ROSE, J., at the trial at Hamilton, dismissing the action, which was brought by the firm of Talbot, Cockroft, & Harvey, who were carpet manufacturers at Elora, and by their assignee for the benefit of creditors, to recover upon a policy of insurance against accidents in their factory. An employee in the factory had his fingers cut off by a machine, and brought an action against the



plaintiffs for compensation, which action was defended by the present defendants, and recovered \$1,200 and costs, which the plaintiffs in this action sought to recover against the insurers. The defence was mainly based upon a condition of the policy that "the employer shall, at the cost of the company, render them every assistance in his power in carrying on any suit which they shall undertake to defend on his behalf."

*Held*, that the implication from the condition was that the employers should not assist the opposite side, and the evidence showed that one of the plaintiffs had assisted the other side, and in view of the case of *Wythe v. Manufacturers' Ins. Co.*, 26 O. R. 153, the Court should not interfere to assist the plaintiffs.

The appeal was dismissed with costs.

*Aylesworth*, Q.C., and *Teetzel*, Q.C., for the plaintiffs.

*W. Nesbitt* and *J. H. Denton*, for the defendants.

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[14TH MAY, 1897.]

### REGINA v. McRAE.

*Justice of the peace—Jurisdiction—Associate justices—Request.*

Where a justice of the peace issues a warrant or a summons, and the accused is brought before him, he is seized of the case, and no other magistrate has jurisdiction therein, unless requested by him to sit with him.

*McCarthy*, Q.C., and *D. O. Cameron*, for the defendant.

*Aylesworth*, Q.C., for the prosecutor.

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[19TH MAY, 1897.]

### SAMPLE v. McLAUGHLIN.

*Security for costs—Application against solicitor—Action brought without authority—Applicants out of the jurisdiction.*

Upon an application by the solicitor who brought this action in the names of several plaintiffs for an order for security for costs of proceedings taken against him by two of the plaintiffs,

who resided out of the jurisdiction, to set aside the judgment in this action and strike their names out of the record, upon the ground that the solicitor had no authority from them to bring the action in their names:—

*Held*, that the solicitor having brought these plaintiffs into Court by the use of their names, they were entitled to come into Court to defend themselves against such use, without being required to give security for costs.

*In re Percy*, 2 Ch. D. 581, followed.

*Held*, also, that where a charge of improper conduct is made against a solicitor, who is an officer of the Court, by a person out of the jurisdiction, the Court ought not to order security for costs, and thus prevent such a charge being investigated.

*W. M. Douglas*, for the solicitor.

*Aylesworth*, Q.C., for the applicants.

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[ARMOUR, C.J., STREET, J., 21ST MAY, 1897.]

### PEGG v. HOWLETT.

*Division Court—Jurisdiction—Ascertainment of amount—Promissory note—Interest—56 V. c. 15, s. 2—Abandonment of excess—Recovery on note—Indorsers—Sureties—Parties—Substitution of plaintiff.*

In an action in a Division Court upon a promissory note expressed on its face to be for \$200 and interest, judgment was given for the plaintiff for \$210.

*Held*, that the amount was ascertained by the signatures of the defendants, and the interest accumulated upon the note from the time the amount was so ascertained was not to be included in determining the question of jurisdiction, but interest so accumulated might be recovered in a Division Court, in addition to the claim, under 56 V. c. 15, s. 2, notwithstanding that the interest and the amount of the claim so ascertained together exceeded \$200.

*Held*, also, that the Judge in the Division Court had power, under Rule 7 of the Revised Rules of the Division Courts, to permit the abandonment of the excess caused by the claim for notarial fees.

*Held*, also, that upon payment of the amount of the note by the plaintiff to the original holder, the plaintiff being liable as indorser to such holder, the plaintiff became entitled to the note and to enforce his rights against the other parties to it; and, as it appeared that two of the defendants had indorsed the note as sureties to the plaintiff for the makers, he was entitled to recover against them, although the note was made payable to his order.

*Wilkinson v. Unwin*, 7 Q. B. D. 636, followed.

*Held*, lastly, that Rules 211, 216, and 224 of the Revised Rules of the Division Courts authorized the Judge in the Division Court to substitute the name of the plaintiff for that of the original holder of the note as plaintiff in the action.

*S. W. Burns*, for the defendants.

*C. J. Holman*, for the plaintiff.

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[BOYD, C., 6TH MAY, 1897.]

### TURNER v. DREW.

*Costs—Damages—Set-off—Solicitor's lien—Rule 1205.*

There can be no set-off of damages or costs between the same parties in different actions, to the prejudice of the solicitor's lien; that is the effect of Rule 1205.

The lien is simply a right to the equitable interference of the Court not to leave the solicitor unpaid for his services, and it exists if it is made to appear that the solicitor has not been paid his costs.

*Hislop*, for the plaintiff.

*Delamere*, Q.C., for the defendant.

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[STREET, J., 9TH APRIL, 1897.]

### QUINN v. TOWN OF ORILLIA.

*Municipal corporations—Fire limits—Erection of buildings within—By-law—Validity—Consolidated Municipal Act, 1892, s. 496, s.-s. 10.*

By s.-s 10 of s. 496 of the Consolidated Municipal Act, 1892, the council of every city, town, and incorporated village

may pass by-laws "for regulating the repairing or alteration of roofs or external walls of existing buildings" within the fire limits, "so that the said buildings may be more nearly fire proof."

*Held*, that this does not empower the council to pass a by-law requiring "all buildings damaged by fire, if rebuilt or partially rebuilt," to be made fire proof, at the peril of such building being removed at the expense of the owner.

*Pepler*, Q.C., for the plaintiff.

*J. McCosh*, for the defendants.

[5TH MAY, 1897.]

## GRAND TRUNK R. W. CO. v. HAMILTON RADIAL ELECTRIC R. W. CO.

*Constitutional law—Railways—Restrictions under provincial charter against crossing at grade—Ultra vires—Dominion Railway Act, 1888, ss. 21, 306, 307—Jurisdiction of Railway Committee.*

The defendants were incorporated to construct an electric railway, crossing the plaintiffs' line at Burlington, but forbidden by their charter to cross the line of any steam railway at grade. A dispute arising between the plaintiffs and defendants as to the manner in which the defendants should cross the plaintiffs' line, the matter was brought before the Railway Committee of the Privy Council, who determined that the restriction in the defendants' Act of incorporation forbidding them to cross at grade was *ultra vires* and not binding on the defendants, and made an order allowing the latter to cross the plaintiffs' line at grade.

*Held*, that, subject to the right of appeal to the Governor-General or of reference to the Supreme Court of Canada, the decision of the Railway Committee was, under s. 21 of the Railway Act of 1888, 51 V. c. 29 (D.), final, for ss. 306 and 307 of that Act brought the defendants' line under the legislative authority of Parliament so soon as they proposed to cross the plaintiffs' line.

*Osler*, Q.C., and *W. M. Douglas*, for the plaintiffs.

*Shepley*, Q.C., and *W. W. Osborne*, for the defendants.

## IN CHAMBERS.

[MEREDITH, C.J., 20TH MAY, 1897.]

*In re* SINCLAIR v. BELL.

*Prohibition—Division Court—Territorial jurisdiction—Action against partnership—R. S. O. c. 51, ss. 81, 82, 83, 106, 107, 108.*

Motion by Cyrus Bell for a prohibition to the 2nd Division Court in the county of Oxford to prohibit further proceedings upon a judgment recovered by the plaintiff in a plaint in that Court against the firm of Bell & Bell, of which the applicant had been a member, but which had been dissolved before the issue of the summons, the other partner not being a resident of Ontario. The applicant resided in the county of Brant, and the cause of action arose therein, but the place of sitting of the Division Court in which the plaint was laid was the nearest to the residence of the applicant, and to the place where the firm carried on business. At the trial the County Court Judge overruled the objection to the jurisdiction, and tried the case, giving judgment for the plaintiff.

The following sections of the Division Courts Act, R. S. O. c. 51, are applicable:—

81. Any action cognizable in a Division Court may be entered and tried in the Court holden for the division in which the cause of action arose, or in which the defendant or any one of several defendants resides or carries on business at the time the action is brought, notwithstanding that the defendant at such time resides in a county or division different from the one in which the cause of action arose.

82.—(1) Such action may be entered and tried and determined in the Court the place of sitting whereof is the nearest to the residence of the defendant, and the action may be entered, tried, and determined irrespective of the place where the cause of action arose, and notwithstanding that the defendant at the time resides in a county or division other than the county or division in which the Division Court is situate, and the action entered.

83. In case a person desires to bring an action in a division other than as in the next preceding two sections mentioned, a

County Judge may by special order authorize an action to be entered and tried in the Court of any division in his county adjacent to the division in which the defendant or one of several defendants resides, whether such defendant resides in the county of the Judge granting the order or in an adjoining county.

*Held*, that s. 82 does not apply where there is more than one defendant, unless the condition of the operation of the section as to residence applies to all of them.

*Held*, however, that had the plaintiff sued the applicant alone, as he might have done, the other partner not being resident in Ontario, he could properly have sued in the Court in which he did; and the action might have been treated as one in which the partners were named individually in the summons; and in such case, if it had appeared at the trial that the defendant out of Ontario had not been served, his name would have been stricken out, and the action treated as one against the applicant only; referring to ss. 106 and 107 of the Act, and *Western Bank of New York v. Perez*, [1891] 1 Q. B. at p. 314.

*Held*, also, that s. 108, s.-s. 4, applies to an action against a firm which has been dissolved.

*Wilson v. Roger McLay & Co.*, 10 P. R. 855, followed.

It was conceded by the applicant that if the Judge had chosen to do so, he might at the trial have made an order, under s. 83, permitting the plaintiff to proceed with his action in the 2nd Division Court, Oxford, and that, if he had done so, the jurisdiction of that Court would have been complete; but it was contended that, as the Judge had not done so, the applicant was entitled to prohibition.

*Held*, that, if prohibition were granted, the case would still remain subject to the power of the Judge to make the order, and, as it had been tried on the merits, prohibition should not be granted.

*W. H. Blake*, for the applicant.

*D. Armour*, for the plaintiff.

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[STREET, J., 10TH MAY, 1897.]

### HAGGERT v. TOWN OF BRAMPTON.

*Costs—Taxation—Items common to defence and counterclaim.*

A claim and counterclaim are to be treated as separate

actions, and the costs are to be taxed in accordance with that principle ; but items common to both defence and counterclaim should not be taxed, either in whole or in part, to a defendant who has succeeded upon his counterclaim, but should be wholly disallowed him.

*In re Brown, Ward v. Morse*, 23 Ch. D. 377, followed.

*Griffiths v. Patterson*, 22 L. R. Ir. 656, not followed.

*Summerfeldt v. Johnston*, 17 P. R. 6, distinguished.

*Justin*, for the plaintiff.

*T. J. Blain*, for the defendants.

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[20TH MAY, 1897.]

### FAULDS v. FAULDS.

*Parties—Misjoinder of defendants—Distinct causes of action.*

The plaintiff's claim as against her husband, one of the defendants, was for specific performance of an ante-nuptial contract to transfer to her certain property of various kinds, and as against the several other defendants, to whom the husband had made transfers of such property, or in whose hands it was, for relief by way of declaration, cancellation, and order for payment.

*Held*, that, although the plaintiff's right to each cause of action was historically connected with each of the others, that connection related only to her rights ; the rights of each set of the defendants were as distinct as they were before the events which conferred upon the plaintiff the rights which she asserted ; and such causes of action could not properly be joined in one action.

*Smurthwaite v. Hannay*, [1894] A. C. 494, and *Sadler v. Great Western R. W. Co.*, [1896] A. C. 450, followed.

*Alexander Stuart*, for the plaintiff.

*Talbot Macbeth and Hume Elliott*, for the defendants.

## NOVA SCOTIA.

## In the Supreme Court.

[THE JUSTICES IN BANCO, 3RD APRIL, 1897.]

## REGINA v. CARRIGAN.

*Summary conviction—Service of summons—Proof of—Jurisdiction of justice of the peace—Minutes of evidence—Quashing conviction—Costs.*

The defendant was convicted on the 18th November, 1896, by the stipendiary magistrate for the town of Westville of an offence against the Canada Temperance Act, and fined \$50 and costs. The conviction was made in the absence of the defendant, who did not attend before the magistrate or take any part in the proceedings. Before hearing evidence of the commission of the offence, the magistrate received as proof of the service of the summons on the defendant the following evidence only:—

“A. Nicholson, constable, sworn. I served a copy of the summons on the wife of the defendant on the 18th day of November, 1896. Angus Carrigan, the son of the defendant, was present when I served the summons. I started to read the paper to the old woman, when she told me she could not read. I then explained to her that it was a summons calling Patrick Carrigan to appear at the court house, Westville, at 3 o'clock p.m. on November instant, for a charge against the Scott Act. I made the service at the last place of abode of defendant. The woman I served it on was over 16 years of age.”

The magistrate having in obedience to a certiorari returned the conviction and depositions, among which was the above proof of service of the summons on the defendant, a motion was now made on his behalf to quash the conviction, on the ground that the proof of service did not state or show that the defendant “could not be conveniently met with” in order to make the service on his wife a good one, as required by s. 562 (2) of the Criminal Code, 1892.

*Held*, that the objection was a valid one and must prevail.

Conviction quashed accordingly, without costs, as the motion was unopposed: Crown Rule 34.



*Per* McDONALD, C.J., following *Ex p. Hogan*, 82 N. B. Reps. 247, that something should appear on the minutes of the justice showing evidence of service of the summons on which he could exercise his discretion as to whether such service was sufficient, and this not appearing, the justice would have no jurisdiction to proceed with the case in default of proper proof of service.

The motion for the writ of certiorari having been opposed, it was ordered that the costs of that motion should abide the event, and the Court, in granting a rule to quash the conviction, ordered the informant to pay the costs of that application.

*W. B. A. Ritchie*, Q.C., and *J. J. Power*, for the defendant.

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## MANITOBA.

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### In the Queen's Bench.

[FULL COURT, 6TH MAY, 1897.]

#### DOLL v. HOWARD.

*Contract—Fraud—Carrying on business after knowledge of misrepresentations—Sale to three parties—Attempted rescission by one only.*

An appeal from the decision of TAYLOR, C.J., 16 Occ. N. 251, was dismissed with costs.

*Per* KILLAM, J.—It was impossible to rescind the transaction in question. Although Doll took the separate notes of the defendant and two other persons, he did not sell different parcels of the company's stock to them separately. The evidence showed the transaction to have been a sale of the shares *en bloc* for a single consideration. The notes of each party represented merely a portion of that consideration.

The purchase could not be avoided by the defendant alone as to some of the shares. If rescinded at all, it must be so as between all the purchasers, on the one side, and Doll, on the other, and as to the whole subject of the sale. For this no case was made. The fact of the complete failure of the company and the worthlessness of the stock could not operate to enable the defendant to rescind alone, when he could not have done so originally.

[TAYLOR, C.J., 6TH MAY, 1897.]

## REID v. GIBSON.

*Interim injunction—Motion for—Statement of claim—Relief not prayed for.*

This was a motion, on notice, by the plaintiff for an interlocutory injunction. A preliminary objection was taken that an injunction had not been prayed for in the statement of claim.

For the plaintiff it was contended that under the old practice it might have been necessary to pray for an injunction by the bill, but it was not so since the Queen's Bench Act, 1895, s. 39, s.-s. 11 of which provides that an order for an injunction may be granted in all cases in which it shall appear to the Court to be "just and convenient" that such order should be made.

For the defendant it was contended that there must be a prayer for an injunction. Rule 300 provides that "every statement of claim shall state specifically the relief which the plaintiff claims."

The Court could not, in this instance, allow an amendment for the purpose of praying an injunction, as the cause of action in respect of which the injunction was sought was alleged to have arisen since the filing of the statement of claim.

*Held*, that the motion must be refused with costs.

The old rule undoubtedly was that an injunction could not be granted unless prayed by the bill: *Savory v. Dyer*, Ambl. 70. The only exception seemed to be that after decree an injunction might be granted upon petition, although not prayed for in the bill: *Wright v. Atkins*, 1 V. & B. 314; *Bloomfield v. Eyre*, 9 Jur. 717.

There was no authority for a change in the practice since the Queen's Bench Act, 1895, and there was nothing in the Act or Rules to indicate that any change was intended.

The meaning and effect of the words "just and convenient" in the English Judicature Act, s. 25, s.-s. 8, which is the same as s. 39, s.-s. 11, in the Manitoba Act, were considered in *North London R. W. Co. v. Great Northern R. W. Co.*, 11 Q. B. D. 30.

An injunction cannot be granted where none is prayed for.

*Clark*, for the plaintiff.

*Mulock*, Q.C., for the defendant.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

DIVISIONAL COURT.]

[10TH NOVEMBER, 1896.

## MONTGOMERY v. CORBIT.

*Bankruptcy and insolvency—Assignments and preferences—Fraudulent preference—Previous agreement.*

One of the defendants, when threatened with an action on behalf of the plaintiff to recover damages for slander, conveyed his farm to his co-defendant, his son, the alleged consideration being the son's agreement, entered into some years before, to maintain the grantor and his wife for life. The plaintiff brought the threatened action and obtained judgment for damages and costs, and then attacked the deed, and in that action it was proved that such an agreement had in good faith been made.

*Held*, that the previous agreement, although not proved with sufficient clearness to have enabled either party to it to enforce specific performance, was an answer to the charge of fraud.

Judgment of Court below reversed.

*Aylesworth*, Q.C., and *W. L. Walsh*, for the appellants,

*E. Myers*, Q.C., for the respondent.

ARMOUR, C.J.]

[11TH MAY, 1897.

## LAUGHLIN v. HARVEY.

*Evidence—Negligence—Damages—Malpractice—Exposure of body to jury—New trial—Misconduct of juror.*

In an action to recover damages for alleged malpractice, the plaintiff is not entitled to show to the jury the part of the body

in question for the purpose of enabling them to judge as to its condition.

*Sornberger v. Canadian Pacific R. W. Co.*, ante 162, approved and distinguished.

Judgment of ARMOUR, C.J., reversed.

Attempting to dissuade a witness from giving evidence is such misconduct on the part of a juror as would justify the granting of a new trial.

*Osler*, Q.C., and *W. M. Douglas*, for the appellant.

*H. Lennox*, for the respondent.

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### LEWIS v. MOORE.

*Settlement—Mortgage—Exoneration—Will—Construction—Direction to sell—Time—Legacy—Discretion as to time of payment.*

Certain land, subject with other lands to an overdue mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or her marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death.

*Held*, that the mortgage should be paid out of the settlor's general estate.

A testator devised all his estate real and personal to trustees, upon trust, so soon after his death as might be expedient, to convert into cash so much of his estate as might not then consist of money or first-class mortgage securities, and to invest the proceeds and apply the corpus and income in a specified manner. In a later part of the will there was the following provision: "In the sale of my real estate or any portion thereof I also give my said trustees full discretionary power as to the mode, time, terms, and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property from sale and to offer the same for resale from time to time as they may deem best."

*Held*, that the later clause merely gave a discretion as to the details and conditions of the sale, and did not qualify or

override the specific direction to sell as soon after the testator's death as might be expedient.

The testator gave certain shares of his estate to two sons, the provision for payment being as follows: "To each of my sons, as they arrive at the age of twenty-three years, or so soon thereafter as my said trustees shall deem it prudent or advisable so to do, they shall pay over one moiety of his share of the corpus of said estate and the accumulated income on said moiety, if any, and the remaining moiety upon his attaining the age of twenty-seven years, or so soon thereafter as they shall deem it advisable so to do."

*Held*, that this direction did not give the trustees an absolute discretion as to the time of payment, but that the general rule, that every person of full age to whom a legacy is given is entitled to payment the moment it becomes vested, applied.

Judgment of ARMOUR, C.J., affirmed.

*McCarthy*, Q.C., and *W. M. Douglas*, for the appellants.

*Shepley*, Q.C., for the respondents plaintiffs.

*W. B. Raymond*, for the infant respondent.

*Moss*, Q.C., and *H. J. Wright*, for the other respondents.

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ROSE, J.]

### HOOVER v. WILSON.

*Executors and administrators—Accounts—Compensation.*

An executor who discharges his duty honestly, but owing to want of business training keeps his accounts loosely and inaccurately, is entitled to compensation for his care, pains, and trouble, but the amount of compensation should not, in such a case, be relatively large.

Compensation when allowed should be credited to the executor at the end of each year.

Judgment of ROSE, J., reversed.

*Moss*, Q.C., and *J. C. Rykert*, for the appellant.

*H. H. Collier*, for the respondents.

*In re* COUNTY OF CARLETON AND CITY OF OTTAWA.

*Municipal corporations—City separated from county—Maintenance of court house and gaol—Compensation for use of—Care and maintenance of prisoners—55 V. c. 42, ss. 469, 473.*

No compensation can be awarded by arbitrators to a county municipality in respect of the use by a city separated from that county of the court house and gaol, unless the question is specifically referred to them by a by-law of each municipality.

A claim for compensation for the care and maintenance of prisoners stands, so far as the meaning to be given to the word "city" is concerned, upon the same basis as a claim for compensation for the use of the court house and gaol.

The right to and mode of arriving at the amount of compensation for the use of the court house and gaol considered.

Judgment of ROSE, J., affirmed.

*Chrysler*, Q.C., for the county corporation.

*D. B. MacTavish*, Q.C., for the city corporation.

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FALCONBRIDGE, J.]

## BICKNELL v. PETERSON.

*Patent of invention—New application of old mechanical device.*

The application to a new purpose of an old mechanical device is patentable, when the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study.

The application to an oil pump of the principle of "rolling contact" was held patentable.

Judgment of FALCONBRIDGE, J., reversed.

*Aylesworth*, Q.C., and *A. E. Shaunessy*, for the appellant.

*J. G. Ridout*, for the respondents.

MACMAHON, J.]

BOURGARD v. BARTHELMES.

*Slander—Privilege—Interest—Duty.*

The defendant, while aiding, at his request, the owner of stolen material in his search for it, said, when what was supposed to be part of it was found in the possession of a workman employed by the defendant, that the plaintiff had stolen it.

*Held*, that, both on the ground that the defendant had an interest in the search, and on the ground that it was his duty to tell his workman that the material did not belong to the person from whom he had received it, the statement was *prima facie* privileged.

Judgment of MACMAHON, J., reversed.

*E. Taylour English*, for the appellant.

*John Greer*, for the respondent.

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MEREDITH, J.]

DALE v. WESTON LODGE I. O. O. F.

*Life insurance—Benevolent society—"Member in good standing"—Domestic forum.*

Where the rules of a benevolent society give to a member dissatisfied with a decision as to sick benefits a right of appeal to a domestic forum, the widow of a member, whose application for sick benefits has in his lifetime been refused, and who has acquiesced in that decision and has not appealed, cannot recover sick benefits.

Judgment of MEREDITH, J., reversed.

Where, however, the widow of "a member in good standing" is entitled to certain pecuniary benefits, and the status of the member has not been passed upon by the society in his lifetime, an action by the widow will lie, and the status of the deceased member at the time of his death is a question of law to be determined in the usual way.

In the present case the fact that the deceased member was at the time of his death in arrear for dues was held, having regard to the constitution and rules of the society, not to deprive him of his status, and the widow was held entitled to recover.

Judgment of MEREDITH, J., affirmed.

*Shepley*, Q.C., and *F. C. Cooke*, for the appellants.

*H. E. Irwin*, for the respondent.

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### IN CHAMBERS.

[Moss, J.A., 1st JUNE, 1897.]

### WELSBACH INCANDESCENT GASLIGHT CO. v. STANNARD.

*Security for costs—Appeal to Court of Appeal—Special order—Judicature Act, 1895, s. 77.*

Motion by the plaintiffs for a special order under s. 77 of the Judicature Act, 1895, for security for the plaintiffs' costs of the defendants' appeal to the Court of Appeal from the judgment of Boyd, C., at the trial, in favour of the plaintiffs, upon the ground of the defendants' inability to pay the plaintiffs' costs in case the appeal should prove successful.

*Held*, that, there being no reason to suppose that the defendants were not intending to prosecute their appeal in good faith, and as they were conforming to the injunction obtained by the plaintiffs at an early stage, and as their ability to answer for costs had not been put to the test of an execution, and the proof of their alleged inability rested in great measure upon statements founded upon information and belief, it was not a case for ordering security.

*McCormick v. Temperance, etc., Co.*, 17 P. R. 175; *Confederation Life Association v. Kinnear*, cited in that case; *Donnelly v. Ames*, 17 P. R. 106; and *McDougall v. Copestoke*, 34 Sol. J. 347, referred to.

Application refused. Costs in the appeal.

*R. McKay*, for the plaintiffs.

*James Bicknell*, for the defendants.



## HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 27TH MAY, 1897.]

## HAMMOND v. KEACHIE.

*Husband and wife—Contract of wife—Separate estate—Action after husband's death—Liability—R. S. O. c. 132, s. 3, s.-ss. (2), (3), (4)—Form of judgment.*

In 1894 a married woman, possessed of a separate estate, entered into a covenant for payment of money, in which her husband joined. In an action against her upon the covenant, begun in 1897, after the death of her husband, but before the passing of 60 V. c. 22 :—

*Held*, that under s. 3, s.-ss. (2), (3), and (4), of the Married Women's Property Act, R. S. O. c. 132, the liability which the defendant undertook by her contract with the plaintiffs was expressly limited by the extent of her separate property then existing and of such separate property as she should afterwards acquire; and the judgment for the plaintiffs for the amount of their claim and costs should be in the usual form, against the defendant, to be levied out of her separate estate owned by her at the time of the contract, or acquired or to be acquired by her at any time afterwards during coverture, so far as the same may not have been disposed of by her.

*Aylesworth*, Q.C., for the plaintiffs.

*F. C. Cooke*, for the defendant.

[5TH JUNE, 1897.]

## FOX v. SLEEMAN.

*Discovery—Documents—Photographs—Privilege—Rule 507.*

In an action by certain persons, claiming to be the next of kin of a testator, the beneficiary under the will having predeceased him, against the administratrix with the will annexed, for administration of the estate, the defendant denied that the plaintiffs were the next of kin of the testator, and alleged that he had no relatives. By her affidavit of documents she stated that she

had in her possession, in her personal capacity, but not as administratrix, certain photographs of the testator, which she objected to produce. The plaintiffs sought production with a view of establishing the identity of a relative of theirs with the testator.

*Held*, that the photographs in question were "documents" within the meaning of Rule 507, and were not privileged nor protected, and therefore must be produced.

*W. M. Douglas*, for the plaintiffs.

*Aylesworth*, Q.C., for the defendant.

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[BOYD, C., 29TH APRIL, 1897.]

### TURNER v. DREW.

*Trusts and trustees—Husband and wife—Trust deed—Settlement on wife for use of herself and children—Rights of surviving child.*

A husband conveyed certain lands to trustees in trust to receive the rents and pay off a mortgage, and, after payment of the mortgage, to pay the balance into the hands of his wife during her life "for the use of her and (three children) . . . which said moneys shall be at the separate disposal of (the wife), not subject nor liable to the power or control of (the husband), or to his debts, engagements, or disposal."

*Held*, that the plaintiff, who was the sole surviving child, and was well up in years, and unable to keep herself, was entitled to half the yearly income.

*T. Hislop*, for the plaintiff.

*Delamere*, Q.C., and *Reesor*, for the defendant.

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[26TH MAY, 1897.]

### DAW v. ACKERILL.

*Church—Incumbent's salary—Liability of churchwardens—Voluntary contributions.*

Where the free pew system has been adopted in a church, and the voluntary contributions of the congregation are the

only means of meeting the expenses, no personal responsibility rests upon the churchwardens in respect of the incumbent's salary; the measure of their liability to him is the extent to which they receive moneys wherewith to pay his salary; and if they have nothing, he can get nothing.

*John Williams and W. S. Morden*, for the plaintiff.

*S. Masson*, for the defendants.

[OSLER, J.A., 1ST JUNE, 1897.]

*In re* PICKETT AND TOWNSHIP OF WAINFLEET.

*Municipal corporations—By-law—Submission to electors—Omission to post by-law and notice—55 Vic. c. 42, s. 293—Irregularities—Result of voting—Saving clause, s. 175.*

Upon a motion to quash a municipal by-law which required the assent of the electors, and was voted upon by them and carried by a majority of 16 in a total vote of 550 out of an electorate of 941:—

*Held*, that the unexplained omission of the council to put up a copy of the by-law with a notice stating, *inter alia*, the hour, day, and places of taking the votes, in four or more of the most public places in the municipality, as required by s. 293 of the Municipal Act, 55 V. c. 42, or at any place therein, was fatal to the by-law, the evidence disclosing many other irregularities, and the onus which was upon the council to show, under s. 175, that the proceedings were conducted in accordance with the principles laid down in the Act, and that the result was not affected by the mistakes and irregularities, not being satisfied.

*J. J. Maclaren*, Q.C., for the applicant.

*DuVernet and L. C. Raymond*, for the municipality.

*In re* HARLEY'S ESTATE.

*Executors and administrators—Administration of estate—Bequest to charities—Next of kin—Advertisement for—Payment into Court—Discharge—Petition for advice—R. S. O. c. 110, s. 37.*

A petition by Rebecca A. Wass, the executrix of the will of

William Wass, who was the executor of the will of John Harley, under s. 87 of the Act respecting trustees and executors and the administration of estates, R. S. O. c. 110, for an order authorizing the petitioner to make inquiries as to the relatives and next of kin of the deceased John Harley, and giving directions as to the disposition of certain moneys forming part of his estate.

*Held*, that, in the absence of any of the heirs or next of kin of the testator, the Court could not give an opinion as to the right of the executrix to dispose of the residue of the estate in accordance with the directions in the will, viz.: "among churches and charities or otherwise as he" (the original executor) "may see fit." It was quite possible, having regard to the date of the will, the vagueness of the language, and the nature of the estate, that the direction might prove ineffectual. In the absence of the next of kin, it would be a dangerous experiment for the petitioner to attempt to comply with it. There was no reason why she should concern herself in the matter at all. She had paid the debts and the one legacy about which there could be no question, and some years ago she obtained an order for leave to pay the balance in her hands into Court. She paid it in accordingly, and was discharged from all further responsibility, especially as she or the former executor had advertised for heirs and next of kin of the testator without result. All she needed to do was to leave the money where it was, where the next of kin would find it when they applied for it, or where the Crown might do so if it desired to establish a claim.

No order made.

*Lazier*, Q.C., for the petitioner.

*J. R. Cartwright*, Q.C., for the Attorney-General for Ontario.

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[ARMOUR, C.J., 26TH MAY, 1897.]

### WRIGHT v. WRIGHT.

*Will—Construction—Period of vesting—Infant—Investment of share.*

Motion by the plaintiffs, the executors, for judgment on the pleadings in an action for the construction of the will of the late James Garrard Wright. The will was made on the 5th

August, 1892, and the testator died on the 11th June, 1896. The testator devised and bequeathed all his estate to his executors, and directed them to sell it within one year after his decease, and divide the proceeds among his wife and daughters in the manner set out in the will, and proceeded: "In the event of one or more of my said daughters dying without lawful issue, then in such case her or their share or shares of the proceeds of the sale of my said real and personal estate is to be equally divided, share and share alike, among the survivors of my children; and in the event of the decease of one or more of my said daughters leaving lawful issue, then in such case their heir or heirs are to receive their deceased parent's share equally divided among them; said share or shares are to be invested in mortgage or debenture securities or deposited in a chartered bank by my executors until each heir or heirs shall have respectively attained the age of 21 years." One of the daughters, Fanny Jane, survived her father and died on the 18th August, 1896, intestate, without receiving her share, and leaving her surviving her husband, the defendant Israel Kelly, and one child, the defendant Ernest Kelly, an infant.

*Held*, that the intention of the testator was that in case a daughter should die before receiving her share, leaving lawful issue, the executors were to invest the share of that daughter for her children until they should be of age; the effect of the whole will was to make a provision in case any daughter should die before her share should be paid over.

Judgment declaring the defendant Ernest Kelly entitled to the share of his mother, and that the plaintiffs should invest it until his majority; also, that the plaintiffs should pay the pecuniary legacies to the daughters of the testator. Costs of all parties, including the official guardian, out of the estate; those of the plaintiffs as between solicitor and client.

*A. Millar*, Q.C., for the plaintiffs.

*H. Guthrie*, for the adult defendants.

*F. W. Harcourt*, for the infant defendants.

*In re* SOLICITORS.

*Solicitor—Taxation of bill—Scale of costs—Action—Recovery.*

An appeal by John and William Howarth, the applicants for taxation, from the report or certificate of the junior taxing officer at Toronto upon the taxation of the solicitors' bill of costs rendered to the applicants in respect of services as plaintiff's solicitors in an action of *Howarth v. Smith Wool Stock Co.*, upon the ground, among others, that the officer should not have allowed the solicitors costs upon the High Court scale, for, although the action was brought in the High Court, the plaintiff recovered against the defendant in that action only \$125 and costs on the County Court scale, and the solicitors were entitled to their costs against their client only on that scale.

*Tremear*, for the appellants, relied on *Scanlan v. McDonough*, 10 C. P. 104.

*R. McKay*, for the solicitors, contended that the rule laid down in *Scanlan v. McDonough* did not apply here, because the solicitors did not themselves bring the action, which was brought by another solicitor, and the conduct transferred to these solicitors during the progress of the action, and they therefore had no opportunity of pointing out to the clients that the action should be brought in the County Court, or, if brought in the High Court, the risk which would ensue as to costs.

ARMOUR, C.J., considered that he was bound by *Scanlan v. McDonough*, though in his opinion the inquiry should be whether the solicitor had reasonable grounds for bringing the action in the High Court; and, being bound by that case, must hold the solicitors entitled only to County Court costs.

Appeal allowed with costs and reference back to taxing officer directed to tax the costs on the County Court scale.

[5TH JUNE, 1897.]

*In re* BIRELY AND TORONTO, HAMILTON, AND BUFFALO R. W. CO.

*Railways—Lands injuriously affected—Arbitration and award—51 V. c. 29, ss. 90, 92, 144 (D.)—Compensation—Damages—Operation of railway—Interest.*

A claimant entitled, under the Railway Act of Canada, 51 V. c. 29, to compensation for injury to lands by reason of a railway, owing to alterations in the grades of streets and other structural alterations, is also, having regard to ss. 90, 92, and 144, entitled to an award of damages arising in respect of the operation of the railway, and to interest upon the amounts awarded, notwithstanding that no part of such lands has been taken for the railway.

*Hammersmith, etc., R. W. Co. v. Brand*, L. R. 4 H. L. 171, distinguished.

*Aylesworth*, Q.C., and *F. R. Waddell*, for the claimant.

*D'Arcy Tate*, for the railway company.

[MEREDITH, C.J., 26TH MAY, 1897.]

## HARTLEY v. MAYCOCK.

*Title to land—Conveyance by married woman—Non-joinder of husband—59 V. c. 41—Limitation of actions—Visible possession—Enclosed lands—Unenclosed lands—Sale of timber—Trespass—Interval in possession—Building operations—Farm work—Adverse possession—Assertion of right by true owner—Equivocal acts—Entry by one tenant in common—Residence out of Ontario—Possession of unenclosed lands—Colour of right—Conveyance—Entry—Improvements under mistake of title.*

1. The plaintiff claimed an undivided interest in the farm of his uncle, who died intestate and without issue in 1854, seised in fee simple and in possession.

One of the links in the chain of title of the uncle was a conveyance made in 1846 by a married woman, whose husband did not join in the conveyance.

*Held*, that the conveyance was wholly inoperative, and was not validated by 59 V. c. 41, as the action was begun before the

passing of the Act, and s. 2 excepts pending litigation ; and this objection was fatal to the plaintiff's claim, for, although the uncle's possession was evidence of his seisin, the plaintiff's case disclosed his title, and showed that the true title was in the married woman.

2. Shortly after the uncle's death his widow returned to the farm, which she found in possession of a man put in by a person to whom her husband had contracted to sell, and she thereupon forcibly took possession, and continued to reside upon the farm till her death in 1877, with the exception of a short interval in 1874. During this whole period she tilled such part of the farm as was enclosed and under cultivation, and put such part as was enclosed and not under cultivation to the ordinary farm uses. In 1873 she made a conveyance of the whole farm to a neighbouring farmer, who worked it until 1879, and then rented it until 1881, after which he put his son, one of the defendants, into possession, and the latter then continued to work it up to the time this action was brought in 1895, though until 1889 he did not live in the house erected upon it. In 1885 the widow's grantee purchased the rights of the heirs-at-law of the person to whom the plaintiff's uncle had contracted to sell.

*Held*, that the widow entered as a trespasser, and so, in order to extinguish the right and title of the heirs, her twenty years' possession must have been actual, visible, and continuous ; and the Statute of Limitations operated only as to the enclosed part, notwithstanding sales by her of timber from the unenclosed part, which must be treated as mere acts of trespass.

*Harris v. Mudie*, 7 A. R. 414, followed.

8. In April, 1874, the dwelling-house on the farm was destroyed by fire, and during a short period until it was rebuilt the widow did not actually live upon the farm, but stayed in the neighbourhood, and the work of the farm went on as usual.

*Held*, that during this interval her possession was a visible one, by reason of the building operations and the farm work.

*Agency Company v. Short*, 18 App. Cas. 793, and *Coffin v. North American Land Company*, 21 O. R. 80, distinguished.

4. The plaintiff's cousin, another of the heirs-at-law, resided with the widow upon the land for about two years after her return to it, but at that time had no interest in it, his father being then alive ; and he made occasional visits to it in subse-



quent years, and paid the taxes on it for 1872, but during all this time he made no claim to any interest in the land.

*Held*, upon the evidence, that he did not go upon the land in the assertion of a right, as owner of an interest, to live upon it, but did so merely as a guest of his aunt, and in paying the taxes he did so on her behalf and as an act of kindness, and not as having or claiming an interest for himself or any one else; and therefore it could not be said that the possession was not hers, or that it was a possession by his license.

5. And, even if what happened amounted to an entry, that entry did not operate in favour of the plaintiff, for an entry by one tenant in common is not an entry by his co-tenant.

6. The fact that all the plaintiff's co-heirs were resident out of Ontario entitled them to no longer time to bring their action than if they had been residents: 25 V. c. 20.

7. *Held*, therefore, that in 1874 the right and title of the heirs-at-law as to the enclosed part of the farm were extinguished.

8. The widow's grantee entered not as a mere trespasser, but, after the conveyance to him, or, at all events, after the expiration of twenty years from her entry, was in under colour of right, and his right was not confined to the portion of the land of which he was in pedal possession, but he and those claiming under him were in the actual and visible possession of the whole of the land included in his conveyance; and the right and title of the plaintiff were therefore extinguished; notwithstanding an entry made in 1878 by the plaintiff, who had not then any interest in the land or any authority from those interested in it.

9. But if not, the defendants were at least entitled to be paid for their lasting improvements since the purchase in 1885, with a set-off of the mesne profits since that date.

*E. D. Armour, Q.C., J. L. Murphy, and Sale*, for the plaintiff.

*A. H. Clarke*, for the defendants John J. Maycock and Lydia J. Maycock.

*Allan Cassels*, for the defendants the Building and Loan Association.

[MACMAHON, J., 3RD JUNE, 1897.]

ROWAN v. TORONTO R. W. CO.

*Jury—Findings—Interpretation of—Negligence—Contributory negligence—  
Street railways.*

Action to recover damages for injuries sustained by the plaintiff, caused, as alleged, by the defendants in running one of their motor cars in Spadina Avenue, in the city of Toronto, negligently, recklessly, and at a dangerous rate of speed. The plaintiff, a barrister, was riding upon a bicycle when he was struck by the car in question.

The jury found as follows: (1) That the defendants were guilty of negligence in running the car. (2) That the negligence consisted in running too fast. (3) That such negligence was the cause of the accident. (4) That the car was running at the rate of 16 miles an hour at the time of the collision. In answer to the fifth question, "Could Rowan by the exercise of reasonable care and diligence have avoided the accident?" the jury said, "We believe that it could have been possible." And they assessed the damages at \$1,500.

*E. F. B. Johnston, Q.C., and F. A. Drake, for the plaintiff.*

*McCarthy, Q.C., and James Bicknell, for the defendants.*

MACMAHON, J.—Had the jury answered the fifth question by a simple "yes," I must have directed that judgment be entered for the railway company. Then does the language by which the question is answered convey any other meaning or have any other interpretation than an affirmative answer? The only way I have been able to read the question and answer together is: "It was possible for Rowan by the exercise of reasonable care and diligence to have avoided the accident." If that is the proper interpretation, then the effect of the answer is the same as if the jury had simply said "yes." "Possible" means "practicable," "feasible," "likely." If it was practicable for the plaintiff to have avoided the accident, then he comes under the sixth proposition laid down by Lord Esher, M.R., in *The Bernina*, 12 P. D. 58, which is as follows: "If the plaintiff has been personally guilty of negligence which has partly directly caused the accident, he cannot maintain an action against any one."

Action dismissed without costs.

[STREET, J., 29TH MAY, 1897.]

## FISHER v. FISHER.

*Life insurance—Construction of policy—Beneficiary—Designation—Assignment of policy—Security for advances—Trust—Evidence.*

The plaintiff was the widow of James T. Fisher, deceased; the defendant was a brother of the deceased; and the action was brought to recover \$835 received by the defendant upon a policy of insurance upon the life of the deceased, issued 19th May, 1888, by the Commercial Travellers' Mutual Benefit Society. By the policy the society promised to pay the amount insured, upon the death of the insured person, to "Mrs. Agnes E. E. Fisher, his wife, or such other beneficiary or beneficiaries as the said James T. Fisher may in his lifetime have designated in writing indorsed on this certificate, and in default of any such designation to his legal personal representatives." The application stated that the money was to be paid to the wife. On the 12th April, 1892, the deceased indorsed an absolute assignment of the policy to his brother, the defendant, and notice of the assignment was given by him to the society, and all premiums were afterwards paid by the defendant. The assignment was, however, shown to have been made only as security for advances.

*Held*, that, in the absence of an indorsement designating a beneficiary, the insurance money belonged to the legal personal representatives of the insured. There was no designation, either on the face of the certificate or elsewhere, constituting the plaintiff a beneficiary, and she never was entitled as a beneficiary to this money. The statement in the application that the money was to be paid to the plaintiff did not affect the matter. There was no contract between the deceased and the plaintiff, nor between the plaintiff and the society. The deceased must be taken to have approved of the form in which the certificate issued, which gave him a right to assign it, because he acted upon that right, rather than to have supposed it to be in a form which would not permit of his assigning it.

If it were possible to place upon the certificate the construction contended for by the plaintiff, a right to revoke the trust in her favour was still reserved to the deceased, and no absolute and irrevocable trust such as was contemplated by the statute

was ever created in her favour. The result would then be to give to the defendant a charge for the money advanced at the time of the assignment, with interest, and he would also have the premiums paid by him, as paid by way of salvage.

*Held*, also, upon the correspondence, that the defendant, believing he was entitled to a charge for all his advances, under the conversations had with his brother, so stated the fact to the plaintiff, and that she, desiring to pay her husband's debts and funeral expenses, ratified the action of the defendant in paying out these sums on her husband's account, and assented to his retaining his own claim, so far as the money would go.

In either case the action failed, and should be dismissed with costs.

*McCarthy*, Q.C., for the plaintiff.

*Aylesworth*, Q.C., for the defendant.

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## NEW BRUNSWICK.

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In the Supreme Court.

IN CHAMBERS.

[LANDRY, J., 8TH APRIL, 1897.]

McANN v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

*Pleading—Life insurance company—Incorporation—Denial—Striking out.*

This was an application on the part of the plaintiff to strike out a certain plea of the defendants, upon the ground that it was false, frivolous, vexatious, and embarrassing. The action was brought upon a life insurance policy issued by the defendants, and the plea was in the following words: "*That the defendants were not duly constituted, incorporated, and empowered as alleged.*" The policy stated that the defendants were an incorporated company.

*Held*, that the plea was bad and must be struck out.

*W. B. Chandler*, for the plaintiff.

*Allen O. Earle*, Q.C., for the defendants.

## MANITOBA.

## In the Queen's Bench.

[TAYLOR, C.J., 28TH MAY, 1897.]

## REGINA v. CROTHERS.

*Liquor License Act—License cancelled by commissioners, after petition presented—Summary conviction for selling after cancellation of license—Power of Court to inquire into regularity of proceedings of commissioners—Provincial offences—Criminal matters—Motion to quash conviction—Forum—Full Court.*

Motion for a writ of *certiorari*, or, in the alternative, for an order quashing a summary conviction of the defendant under the Liquor License Act, R. S. M. c. 90, for selling liquor without a license.

The defendant had a license under the Act authorizing him to sell liquor from 1st June, 1896, until 31st May, 1897. On 17th June, 1896, a petition was presented under s. 35 of the Act for the cancellation of the license. The defendant was notified of the presentation of the petition, and the commissioners met on 16th July to consider it. At that meeting they were served with an interim injunction, and adjourned without taking any action. A motion to continue the injunction was refused, and the refusal was affirmed on appeal to the full Court: *Crothers v. Monteith*, 11 Man. L. R. 373; 16 Occ. N. 362; *ante* 33.

The commissioners at a subsequent meeting cancelled the license. The defendant, with the intention of testing the regularity of the commissioners' proceedings, made one sale of intoxicating liquor, for which he was convicted and fined. It was to quash this conviction that this application was made.

The Act gave no appeal from any decision of the commissioners, or against any action they might take.

*Held*, that the commissioners were not a court: *Re Thomas*, 26 O. R. 448: so the Court of Queen's Bench had not any

inherent right of appellate jurisdiction over them. It could have such jurisdiction only by express statutory enactment.

The commissioners were the only persons to whom the Legislature had intrusted the granting or withholding or cancellation of licenses. From them there was no appeal.

The action of the commissioners in cancelling the license of the applicant was a matter which could not be inquired into in the Court of Queen's Bench: *Regina v. Holl*, 7 Q. B. D. 575; *Preece v. Harding*, 24 Q. B. D. 110.

Proceedings under Provincial Acts are sometimes spoken of as quasi-criminal, but they must all be classed as criminal matters, on the principles laid down by the Court of Appeal in such cases as *Mellor v. Denham*, 5 Q. B. D. 467, and *Regina v. Whitchurch*, 7 Q. B. D. 534.

Applications to quash convictions under a Provincial Act must be made to the full Court.

*Regina v. Beale*, 11 Man. L. R. 448, 16 Occ. N. 395, followed.

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## Supreme Court of Canada.

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QUEBEC.]

[1ST MAY, 1897.

### TOWN OF CHICOUTIMI v. LÉGARÉ.

*Municipal corporations—Waterworks—New works—Extension of works—Repairs—By-law—Resolution—Agreement in writing—Written contract—Highways and streets—R. S. Q. Art. 4485—Art. 1033a, C. C. P.—Injunction.*

By a resolution of the council of the town of Chicoutimi, on the 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets, wherever he thought proper, taking his water supply from the river Chicoutimi, at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time, and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but, the system proving insufficient, a company was formed in 1895, under the provisions of R. S. Q. Art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir, and to make new excavations in the streets for these purposes, without receiving any further authority from the council.

*Held*, Gwynne, J., dissenting, reversing the judgment appealed from, that these were not merely necessary repairs, but new works which were actually part of the system required to be completed during the year 1892, and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town.

*Held*, also, that the resolution and the application upon which it was founded constituted a "contract in writing and a

written agreement," within the meaning of Art. 1038a of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of new works.

*Geoffrion, Q.C., and Belleau, Q.C., for the appellants.*

*Stuart, Q.C., for the respondent.*

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### LAMBE v. ARMSTRONG.

*Sheriff—Sale of lands—False bidding—Order for re-sale—Operation as to lands withdrawn before sale—Sheriff's deed—Improper issue of—Registration—Necessity for annulment—Appeal—Question of practice—Duty of appellate Court.*

Questions of practice raised on appeal may be taken into consideration by the Supreme Court of Canada when the decision of such questions involves substantial rights in litigation or might have the effect of causing grave injustice.

Part of lands seized by the sheriff had been withdrawn before sale, but on proceedings for *folle enchère* it was ordered that the property described in the *procès-verbal* of seizure should be re-sold, no reference being made to the part withdrawn. On appeal, the Court of Queen's Bench reversed the order, on the ground that it directed a re-sale of property which had not been sold, and further because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for re-sale, or prior to the proceedings for *folle enchère*.

*Held*, that the Court of Queen's Bench should not have set aside the order, but should have reformed it by rectifying the error. Where a sheriff's deed has issued improperly and without authority, it must be treated as an absolute nullity, notwithstanding that it has been registered, and may appear upon its face to have been regularly issued, and in such a case it is not necessary to have it annulled upon taking proceedings for *folle enchère*.

Judgment of the Court below reversed.

*MacMaster, Q.C., and Stephens, Q.C., for the appellant.*

*Morgan, for the respondent.*



## ROBIN v. DUGUAY.

*Will—Construction—Donation—Substitution—Partition, per stirpes or per capita—Usufruct—Alimentary allowance—Accretion between legatees.*

The late Joseph Rochon made his will in 1852, by which he devised to his two sisters the usufruct of all his estate, and the property therein to his children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested accordingly, to the best of the executor's judgment, adding to these directions the words "*enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites soeurs et conserver les fonds pour leurs enfants,*" and providing that these legacies should be considered as an alimentary allowance, and should be non-transferable and exempt from seizure. By a codicil in 1890, he appointed a nephew as his testamentary executor, in the place of the uncle, who had died, and declared: "*Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux soeurs usufructières, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament.*"

*Held*, Gwynne, J., dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters, and of the estate, subject to the usufruct, to their children, which took effect at the death of the testator.

*Held*, also, that the charge of preserving the estate—"conserver les fonds"—imposed upon the testamentary executor, could not be construed as imposing the same obligation upon the sisters, who were excluded from the administration, or as having, by that term, given them the property subject to the charge that it should be handed over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct.

*Held*, also, that the property thus devised was subject to partition between the children *per capita*, and not *per stirpes*.

Judgment of the Court below affirmed.

Robidoux, Q.C., for the appellant.

A. Geoffrion, for the respondent.

## DUROCHER v. DUROCHER.

*Evidence—Judicial admissions—Nullified instruments—Cadastre—Plans and official books of reference—Compromise—"Transaction"—Estoppel.*

A will, in favour of the husband of the testatrix, was set aside in an action by the heir-at-law, and declared by the judgment to be *un acte faux*, and therefore to be null and of no effect. In a subsequent petitory action between the same parties:—

*Held*, GIROUARD, J., dissenting, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir-at-law, by reason of anything the devisee had done in respect of the will; first, because the will, having been annulled, was for all purposes unavailable; and, secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission.

The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts, recorded under Art. 225, C. C. P., cannot be invoked as a judicial admission, in a subsequent action of a different nature between the same parties.

Statements entered upon cadastral plans and official books of reference made by public officials and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof at the time the entries were made.

A deed was entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation, but failed to attain its end, and was annulled and set aside by order of the Court as being in contravention of Art. 311 of the Civil Code of Lower Canada.

*Held*, GIROUARD, J., dissenting, that upon the nullification of the deed, no allegation contained in it could subsist even as an admission.

The doctrine of estoppel by deed prevailing under the law of England does not exist under the French law in force in the Province of Quebec, or by virtue of the Code.

[12TH MAY, 1897.]

## CITIZENS' LIGHT AND POWER CO. v. PARENT.

*Appeal from Court of Review—Amount in controversy—Appeal to Privy Council.*

Notwithstanding that the jurisprudence of the Judicial Committee of the Privy Council, where the right of appeal from decisions of the Courts of Lower Canada depends upon the amount in controversy exceeding £500 sterling, is that the measure of value for determining such right is the amount recovered in the action, yet in appeals to the Supreme Court of Canada from the Court of Review, which by 54 & 55 V. c. 25, s. 3, s.-s. 3, must be appealable to the Judicial Committee of the Privy Council, the amount by which the right of appeal is to be determined is that demanded, and not that recovered, if they are different, as provided by s.-s. 4 of s. 3 of the Act, and by R. S. Q. Art. 2311.

*R. C. Smith*, for the appellant.

*Charbonneau*, for the respondent.

NOVA SCOTIA.]

[1ST MAY, 1897.]

## TEMPLE v. ATTORNEY-GENERAL FOR NOVA SCOTIA.

*Mines and minerals—Lease of mining areas—Rental agreement—Payment of rent—Forfeiture—R. S. N. S., 5th ser., c. 7—52 V. c. 23.*

By R. S. N. S., 5th ser., c. 7, a lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year, on pain of forfeiture of his lease, which, however, could only be effected through certain formalities. By an amendment in 1889, 52 V. c. 23, the lessee is permitted to pay in advance an annual rental in lieu of work, and by s.-s. (c) the owner of any leased area may, by duplicate agreement in writing with the commissioner of mines, avail himself of the provisions for such annual payment, and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By s. 7 all

leases were to contain the provisions of the Act respecting payment of rental, and its refund in certain cases, and, by s. 8, s. 7 was to come into force in two months after the passing of the Act.

Before the Act of 1889 was passed, a lease was issued to E. dated 10th June, 1889, for twenty-one years from 21st May, 1889. On 1st June, 1891, a rental agreement under the amending Act was executed, under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On 22nd May, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year, and issued a prospecting license to T. for the same areas. E. tendered the year's rent on 29th June, 1894, and an action was afterwards brought by the Attorney-General, a relative of E., to set aside the license as having been illegally and improvidently granted.

*Held*, affirming the judgment of the Supreme Court of Nova Scotia in such action, that the phrase, "nearest recurring anniversary of the date of the lease" in s.-s. (c) of s. 1 of the Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on 10th June, no rent for 1894 was due on 22nd May of that year, at which date the lease was declared forfeited, and E.'s tender on the 9th June was in time.

*Attorney-General v. Sheraton*, 28 N. S. Reps. 492, approved and followed.

*Held*, further, that, though the amending Act provided for forfeiture, without prior formalities of a lease, in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original Act.

*W. B. A. Ritchie*, Q.C., and *Congdon*, for the appellants.

*Russell*, Q.C., for the respondent.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

ROSE, J.]

[24TH JUNE, 1897.]

## IRWIN v. TORONTO GENERAL TRUSTS CO.

*Executors and administrators—Powers of administrator—Conveyance in lieu of dower—Compromise of creditor's claim—Remedy for contemplated wrong—Injunction—Administration order.*

Action to restrain the defendants from carrying out an agreement by which the defendant company, the administrators with the will annexed of the estate of William Irwin, deceased, agreed to convey to the defendant Martha Irwin, his widow, a house and lot, being part of the estate of the deceased, in lieu of dower and in settlement of a claim advanced by her as a creditor of the estate. The plaintiff was the principal legatee and devisee under the will.

*Held*, that dower or right of dower is an estate in the land, and cannot be treated or dealt with as an incumbrance on the land. The widow had not made any election under the provisions of s.-s. 2 of s. 4 of R. S. O. c. 108. She simply claimed her dower, though she was willing to take a conveyance of one of the lots in fee in satisfaction of dower out of the whole of the lands, and in satisfaction of an alleged claim against the estate. This was the conveyance or proposed conveyance objected to by the plaintiff. This right of dower did not devolve upon the defendants at all; it was no part of the estate to be administered by them. They could not properly, without the consent of all who were interested, pay out moneys of the estate to purchase this right of dower, any more than they could properly purchase with such moneys a separate parcel of land. Nor had they any power or authority to convey away one of the parcels of land as the price or purchase money for this dower or right of dower.

*Held*, also, that they had no power to compromise the claim made by the widow as a creditor, they being administrators and not executors: R. S. O. c. 110, s. 81.

The plaintiff should on the merits succeed in both his contentions; but the action should not have been brought. It is not the proper course for a party who is dissatisfied with a matter in the course of an administration of an estate to bring an action and claim an injunction, while there is a summary method of obtaining an order for administration by the Court in all proper cases.

Judgment of ROSE, J., dismissing the action with costs, varied; and administration order granted without costs, if either party so elects; in default of election, action dismissed without costs.

*G. G. S. Lindsey*, for the appellant.

*T. W. Howard*, for the defendant company.

*Skeans*, for the defendant Martha Irwin.

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STREET, J.]

### FRASER v. RYAN.

*Promissory note—Contract—Rescission—Deposit—Forfeiture.*

The plaintiff, on the 18th February, 1895, agreed to sell to the defendant a timber limit for \$115,000, payable \$500 in cash, \$500 in ten days, secured by a promissory note, and the balance in thirty days. The \$500 cash was paid and the note given, but it was not paid at maturity, nor was the \$114,000 paid when due. On the 2nd May, 1895, the plaintiff wrote to the defendant rescinding the contract on account of the non-payment of the purchase money. The defendant afterwards paid \$100 on the \$500 note, and gave a new note for \$400. In an action brought upon the new note, the defendant contended that, although he had forfeited the \$500 paid in cash, he should not forfeit the second \$500, but that it was in the same position as the \$114,000, and could not be recovered after the rescission of the contract.

*Held*, that the contract had been ended by the mutual action of the parties, and the law left them where they had put themselves. Whatever money had passed from one to the other could not be recovered, nor could the note be recovered from the hands of the vendor, nor could he sue upon it to recover the amount of it from the purchaser. The contract was at an end, and all rights thereunder and remedies thereon ended therewith, except that damages for the breach of it might be sought by the vendor. The doctrine applicable to "deposits" did not apply to this subsequent payment, which was not part of the deposit.

Judgment of STREET, J., reversed.

*Haverson*, for the appellant.

*McCarthy*, Q.C., for the plaintiff.

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## HIGH COURT OF JUSTICE.

[FERGUSON, J., ROBERTSON, J., 8TH JUNE, 1897.]

DILL v. DOMINION BANK.

*Discovery—Examination of officers of corporation—Rule 487.*

In an action to recover moneys alleged to have been deposited with the defendants, a banking corporation, at a branch, the plaintiff examined for discovery as officers the persons who were respectively manager and ledger-keeper at the branch at the time the alleged deposits were made. He then sought to examine the general manager.

*Held*, that the plaintiff had the right, under Rule 487, to examine the general manager as an officer of the corporation, and the regular means of procuring his attendance having been taken, there was no excuse for his non-attendance.

*Shepley*, Q.C., for the plaintiff.

*J. D. Montgomery*, for the defendants.

[ARMOUR, C.J., 8TH JUNE, 1897.]

*In re* CONNOR, HUNTER v. CONNOR.

*Gift—Evidence—Burden of proof—Legacy—Advancement—Ademption—Subsequent gift.*

The burden of proving a gift lies upon the donee, and the evidence in support of it must be clear and convincing, strong and satisfactory.

In a proceeding for the administration of the estate of a deceased testator there was a contest as to a portion of his property, of which it was alleged he had made gifts to two of his children in his lifetime.

The testator was over ninety years of age when the gift to his daughter was said to have been made, and was living with her and under her influence; no one was present when the alleged gift was said to have been made except the donor and the donee; the money which was the subject of the alleged gift was lying in the house; and the evidence in corroboration was given by a girl, at that time fourteen years of age, who at the age of seven had been taken to be brought up by the donee, and who was under her influence, and her evidence was that of conversations alleged to have been heard two years before.

*Held*, that the gift was not established.

*Held*, as to the alleged gift to a son of the testator, that the burden of proof was upon him to show that what was admittedly a payment by the testator to him on account of the share coming to him from the testator's estate, was afterwards, by arrangement between him and the testator, turned into a gift. The facts that he tried to get the testator's daughter to use her influence with her father to get the receipt which he had given for the money, that he made her promise to say nothing about his trying to obtain it, and that he offered to share with her in case he was successful in obtaining it, showed that his evidence ought not to be believed.

Appeals from report of Master at Orangeville allowed.

*W. L. Walsh*, for the plaintiffs.

*A. A. Hughson*, for the defendant William Connor.

*J. N. Fish*, for the defendant Mary Ann Donaldson.

*DuVernet*, for the defendant Benjamin Connor.



[MEREDITH, C.J., 18TH MAY, 1897.]

LAKE OF THE WOODS MILLING CO. v. APPS.

*Summary judgment—Rule 744—Application of—Special ground for relief—Fraudulent preference.*

An unopposed application for summary judgment under Rule 744, made the day after service of the writ of summons, in an action against a trader upon a bill of exchange, was refused. It was sworn, among other things, that the defendant had fraudulently transferred his business and property to certain persons; but the Court considered that the plaintiff would not be prejudiced by the action being allowed to proceed in the ordinary way.

*Leslie v. Poulton*, 15 P. R. 332, and *Molsons Bank v. Cooper*, 16 P. R. 195, applied and followed.

*Arnoldi*, Q.C., for the plaintiffs.

[This decision was followed by FALCONBRIDGE, J., on the 15th June, 1897, upon a similar application in the case of *Collins v. Graham*.]

[MOSS, J.A., 18TH MAY, 1897.]

REGINA v. BALLARD.

*Criminal law—Procedure—Trial by jury — Election—Re-election—Mandamus—Duty of sheriff to bring prisoner before County Judge—Criminal Code, ss. 766, 767.*

Where a prisoner charged with arson before a County Judge elects to be tried by a jury, even though his election is made under a mistake, or qualified by the words "at present" being used, and is remanded under s. 767 of the Criminal Code to gaol to await such trial, there is no duty upon the sheriff to notify the Judge a second time, under s. 766, or to bring the prisoner again before him to enable him, the prisoner, to re-elect to be tried by the Judge; and a mandamus will not be ordered to compel him so to do.

*Rowell*, for the prisoner.

*J. R. Cartwright*, Q.C., for the sheriff and the Crown.

[ROSE, J., 23RD JUNE, 1897.]

## WILSON v. LYMAN.

*Trade-mark—Infringement—Use of particular word in advertising.*

Action by Archdale Wilson & Co., wholesale druggists at Hamilton, against The Lyman Bros. & Co. (Limited), wholesale druggists at Toronto, for an injunction restraining the defendants from imitating and infringing on the plaintiffs' trade-marks, labels, envelopes, and boxes, and from imitating and infringing upon the pads manufactured by the plaintiffs and sold under a registered trade-mark consisting of the words "Wilson's Fly Poison Pads."

The defendants described their goods as "The Lyman Bros. & Co. (Limited) Lightning Fly Paper Poison." The word "pad" only appeared upon the envelopes as printed at the top, as follows:—"Three pads in a package, five cents"—"Six pads in a package, ten cents."

The plaintiffs' contention was that the defendants should be restrained from using the word "pad" in any form upon the package. The defendants' contention was that unless the Court had the right to restrain the defendants from putting up fly paper in the form of pads, there was no right to restrain them from stating on the envelopes that there were pads inside.

*Held*, that the plaintiffs were not entitled to have the defendants restrained from using the word "pads" as they did upon their envelopes.

*S. H. Blake, Q.C., and J. J. Scott, for the plaintiffs.*

*D. E. Thomson, Q.C., and D. Henderson, for the defendants.*

[24TH JUNE, 1897.]

## McDONALD v. McDONALD.

*Estate—Crown grant—Construction—Habendum.*

An action for a declaration that the plaintiff was the owner in fee simple of an undivided one-half interest in certain lands, and for partition or sale, and for an account of rents and profits received by the defendants.

The defendants relied on a Crown grant dated 17th March, 1886, of the lands in question to one Ann McDonald, her heirs and assigns forever, *habendum* unto her during the term of her natural life, or during widowhood, with remainder in fee simple to the persons entitled under the will of Donald McDonald, deceased.

*Held*, that this gave her an estate in fee simple absolute, and that the *habendum* did not abridge such estate.

Action dismissed with costs.

*Leitch*, Q.C., for the plaintiff.

*Lavell*, for the defendant May McDonald.

*E. D. Armour*, Q.C., for the defendant company.

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[FALCONBRIDGE, J., 7TH MAY, 1897.]

*In re* DIAMOND v. WALDRON.

*Mandamus—Division Court—Breach of contract—Place of—Cause of action—Where arising.*

The plaintiff, a merchant, gave an order in Ontario for goods to the traveller of the defendants, wholesale merchants in Montreal, "Ship viâ G. T. R. . . . 1st September." The goods were not so shipped, and a correspondence ensued, ending in the defendants refusing to supply the goods.

*Held*, that the breach was the non-shipment "viâ G. T. R." at Montreal, and not the subsequent refusal by correspondence; and, as the whole cause of action did not arise at the place where the order was given, a mandamus to compel a Division Court to try an action for damages for breach of the contract was refused.

*W. R. Riddell*, for the plaintiff.

*George Kerr*, for the defendants.

[MACMAHON, J., 18TH JUNE, 1897.]

BELL v. OTTAWA TRUST AND DEPOSIT CO.

*Collateral securities—Valuing—59 V. c. 22—Administration—Secondary liability.*

Appeal, heard at the Weekly Court at Ottawa, by the Union Bank of Canada, creditors who had proved a claim against the estate of Peter McRae, in administration proceedings, from the certificate of the local master at Ottawa certifying his finding that the security held by the appellants was security on the estate of a third party for whom the estate of Peter McRae was only indirectly or secondarily liable, and his direction that the security should be valued.

Certain timber limits, the property of the firm of McRae Bros. & Co., were assigned by them to the bank as collateral security for the payment of certain promissory notes and any renewals or part renewals thereof. The promissory notes upon which the bank's claim against the estate was based were renewals and part renewals of the original notes. Peter McRae, when he individually signed the notes in question as one of the makers thereof, was a member of the firm of McRae Bros. & Co., and it was not questioned that as to his estate the firm were third parties. There was a deficiency of assets in the estate of Peter McRae to meet the claims of creditors.

The Act respecting the estates of insolvent deceased persons, 59 V. c. 22, s. 1, s.-e. (1), provides as follows: "On the administration of the estate of a deceased person, in case of a deficiency of assets, every creditor in proving his claim shall state whether he holds any security for his claim or any part thereof, and shall give full particulars of the same, and if such security is on the estate of the deceased debtor, or on the estate of a third party for whom the estate of the deceased debtor is only indirectly or secondarily liable, the creditor so proving his claim shall put a specified value on such security."

*Held*, that Peter McRae, as a maker of the notes, was primarily liable to the bank thereon, and his estate did not come within the Act as being indirectly or secondarily liable, and the bank were not, therefore, obliged to value their securities when filing their claim against the estate. The Master found that,

as between the individual partners and the firm, Peter McRae was an accommodation maker of the notes, and it was by regarding the position, rights, and liabilities of the makers of the notes *inter se*, that the confusion arose.

Appeal allowed. Costs out of the estate.

*Travers Lewis*, for the appellants.

*O'Gara*, Q.C., for creditors mentioned in will.

*G. F. Henderson*, for unsecured creditors.

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### IN CHAMBERS.

[Moss, J.A., 14TH JUNE, 1897.]

#### VANSICKLE v. AXON.

*Discovery—Production of documents—Affidavit—Objection to produce—Specification of document.*

Where, in an affidavit of documents made in compliance with the usual order for production, only one document is mentioned, and the possession or control of other documents is negatived, the statement "I object to produce the said document" sufficiently specifies the document mentioned in the affidavit which the defendant objects to produce, although no information is given as to date, nature, or contents.

*James Dickson*, for the plaintiff.

*Douglas Armour*, for the defendant Frederick Axon.

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#### *In re* BENNETT INFANTS.

*Infants—Sale of land—R. S. O. c. 137, s. 3—Dispensing with examination.*

An order was made under R. S. O. c. 137, s. 3, for a sale of infants' lands at a named price, such of the infants as were over fourteen having been examined before a referee, and having given their consent, and the remaining infant, who was under fourteen, having been produced before the referee, who certified with regard to her in the manner directed by the Rules, but the sale was not carried out. A subsequent offer for the lands

at a lower price having been received, an order was made for a sale at that price, the circumstances being such as to show that it was in the interest of the infants; and their further examination was dispensed with, upon its being shown that they were out of the Province, and that they were satisfied to accept the price offered.

*Swabey*, for the applicants.

*F. W. Harcourt*, for the official guardian.

[21st JUNE, 1897.]

### DRYDEN v. SMITH.

*Discovery—Affidavit of documents—Cross-examination—Examination on pending motion—Appointment—Residence of party.*

Where a plaintiff is so situated that he may for some purposes be deemed to have more than one residence within the jurisdiction, and in the writ of summons he designates one of these places as the place where he resides, that place is to be considered his place of residence for the purposes of the action; and an appointment for his examination in another county is irregular.

Rule 512, providing that the deponent in every affidavit on production shall be subject to cross-examination, having been rescinded by Rule 1337, it is not competent for a party to obtain, in effect, a cross-examination of such a deponent upon his affidavit by the indirect means of examining him under Rule 578 for the purpose of using his evidence upon a motion for a better affidavit.

*C. J. Holman*, for the plaintiff.

*R. McKay*, for the defendant.

### DRYDEN v. SMITH (No. 2).

*Pleading—Defamation—Defences—Fair comment—Privilege—Mitigation of damages—Confusion—Embarrassment.*

The plaintiff should not be driven to spell out the defences set up in an action. He is entitled to have them set forth in such

manner as will enable him, upon reading them, to form a fairly correct judgment as to their scope and meaning, and as to what is intended to be relied upon under them. And while the defendant in an action of defamation ought not to be shut out from setting up any matter which he may properly plead either in bar or by way of mitigation of damages, he should so arrange the paragraphs of his statement of defence as to group the separate defences of privilege and fair comment and the matters alleged in mitigation under their appropriate heads.

*C. J. Holman*, for the plaintiff.

*R. McKay*, for the defendant.

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[26TH JUNE, 1897.]

DALE v. WESTON LODGE I. O. F.

*Costs—Scale of—Jurisdiction of taxing officer to determine—Rule 1174.*

An appeal by the plaintiff from the taxation of her costs of the action by the junior taxing officer at Toronto.

The action was tried in the usual way before MEREDITH, J., without a jury, and judgment given for the plaintiff, the amount of which was reduced on appeal to the Court of Appeal, the result being that the defendants were adjudged liable to pay to the plaintiff \$40 for funeral benefits and \$250 for widow's benefits, and also to pay to the plaintiff her costs of the action, to be taxed.

Upon taxation the officer ruled that the plaintiff was only entitled to costs on the County Court scale.

The plaintiff contended that the taxing officer had no jurisdiction to determine the scale, for it was not a case in which judgment was being entered without trial or the decision of a Court or Judge or order as to costs, and so Rule 1174 did not apply.

*Held*, that, there having been a trial, and the plaintiff having thereat been awarded her costs of the action, Rule 1174 gave no jurisdiction to the taxing officer to deal with the scale of costs.

*Brown v. Hose*, 14 P. R. 8, distinguished.

*Andrews v. City of London*, 12 P. R. 44, applied and followed.

*McGarvey v. Town of Strathroy*, 11 P. R. at p. 59, referred to.

Appeal allowed without costs.

*Masten*, for the plaintiff.

*F. C. Cooke*, for the defendants.

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[FALCONBRIDGE, J., 14TH JUNE, 1897.]

LYON v. RYERSON.

*Mortgage—Notice of sale—Abandonment—Costs—Action on covenant—  
Motion for summary judgment.*

After the issue of the writ of summons and service of a notice of motion for summary judgment in an action upon the covenant for payment contained in a mortgage deed, the plaintiff, without the leave required by R. S. O. c. 102, s. 30, served notice of exercising the power of sale contained in such deed. Before the hearing of the motion, the plaintiff gave notice of abandonment of his notice of sale and of all costs in respect thereof.

*Held*, that the effect of the notice of sale was to give the defendant time within which to pay off what was claimed, and unless the defendant was willing to release the plaintiff, he was bound by the notice; and the motion for judgment could not be entertained; but the object of R. S. O. c. 102, s. 30, would be fully attained by directing that the motion should stand over until after the expiration of the thirty days mentioned in the notice.

*T. W. Howard*, for the plaintiff.

*Worrell, Q.C.*, for the defendant.

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HAACKE v. WARD.

*Service of papers—Posting up copies—Rule 1330—Judgment—Irregularity.*

Where service of a statement of claim and notice of motion for judgment was effected, under Rule 1380, by posting up copies in the office in which the proceedings were conducted:—



*Held*, that the posting up of one copy only for two defendants was not to be deemed service on either; and a judgment founded thereon was set aside as irregular.

*G. C. Campbell*, for the plaintiff.

*J. W. McCullough*, for the defendant Ward.

*C. J. Holman*, for the defendant Heise.

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## NEW BRUNSWICK.

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In the County Court.

IN CHAMBERS.

[FORBES, J.C.C., 25TH JUNE, 1897.]

MILLER v. FLEWELLING.

*Style of cause—Misnomer—Clerical error—Nonsuit—Costs.*

On review from the City Court of Saint John :

In this cause the clerk of the Court made a mistake and issued the summons in the name of *Miller* instead of *Milton*. The defendant did not appear, and the magistrate gave judgment against him by default. No amendment of the process was made on the trial.

A nonsuit was ordered with costs of the application.

*John R. Dunn*, for the plaintiff.

*G. H. V. Belyea*, for the defendant.

## MANITOBA.

## In the Queen's Bench.

[FULL COURT, 5TH JUNE, 1897.]

## REGINA v. SAUNDERS.

*Criminal law—Dominion Elections Act—Indictment for ballot box stuffing—  
Evidence of voter as to how he voted—Admissibility.*

Reserved case. The indictment alleged that the defendant, being and acting as a deputy returning officer at the Dominion election for Macdonald, did unlawfully and fraudulently put into the ballot box divers papers purporting to be ballot papers, but to his knowledge not being ballot papers, and being other than the ballot papers which he was authorized by law to put into the ballot box. He was found guilty.

During the trial, one Phillips was called as a witness for the Crown, and deposed that he voted at the election in question. Counsel for the Crown proposed to ask the witness to state for which of the candidates he marked his ballot paper. Counsel for the accused objected on the ground that to allow such a question to be asked and answered was inconsistent with the secrecy of the ballot, contrary to the provisions of the Dominion Elections Act, and contrary to public policy; and also on the ground that the ballot paper marked by the witness being itself the vote, any *viva voce* evidence given by the witness as to how he marked his ballot paper and voted would be only secondary evidence.

TAYLOR, C.J., allowed the question to be asked and answered, but reserved the following questions for the opinion of the full Court:

1. On the trial of an indictment such as that in this case, can a witness, a voter, be asked for whom he recorded his vote

at the election, and be required or allowed to answer that question?

2. Is the answer given by the witness, a voter, stating for whom he recorded his vote, secondary evidence only, and not admissible?

The objection taken and the questions raised were applicable to the evidence of eighteen of the witnesses called at the trial. Without the evidence of these witnesses as to the candidates for whom they recorded their vote, there was not evidence to sustain the indictment.

*Held*, that the answers to the questions should be that the evidence was admissible, and the conviction should be affirmed.

Evidence of voters to show how they voted could properly be received. It was not the voters who objected to disclosing it, and the Act imposes upon them no obligation to keep it secret.

There is nothing in the Dominion Elections Act, or in any other statute, declaring that on the trial of a criminal offence such a question cannot be asked and should not be answered. Section 71 of the Dominion Elections Act refers to legal proceedings questioning the election or return, not to other legal proceedings.

The evidence tendered must be considered as primary and not secondary evidence. In an election under the Dominion Elections Act, neither the ballot paper nor any other document or paper would show how an elector had voted. There was no other mode of ascertaining the fact than the evidence of the voter himself, and such evidence must be held to be primary evidence and admissible.

*Howell*, Q.C., for the Crown.

*Wilson*, for the defendant.

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### SAULTS v. EAKET.

*Contract—Written agreement—Subsequent parol variation—Want of consideration.*

County Court appeal. The plaintiff sued to recover the price of a binder supplied to the defendant. The plaintiff had a verdict, and the defendant appealed.

The plaintiff sued upon a written order signed by the defendant, by which he authorized the plaintiff to ship to him a Deering binder, for which he agreed to pay \$180. That the binder was delivered was not denied. But the defendant asserted that the agreement was that if the machine did not work to his satisfaction, he need not keep it; and alleged that it did not work to his satisfaction, and he returned it.

The plaintiff's agent stated that he made a further condition, after the agreement, that the machine was to do good work, and if it did not work to his satisfaction, the defendant was to put it out on the road, and the agent would get it.

*Held*, that the appeal must be dismissed with costs.

Upon the evidence, it must be held that the condition relied upon by the defendant was made after the order was signed, and was an agreement made entirely without consideration.

The condition sought to be incorporated with the agreement was inconsistent with the written agreement and varied it most materially: *Burgess v. Wickham*, 8 B. & S. 669. If the conversation about the defendant not keeping the machine took place and the condition was made before the signing of the order, the defendant, relying on it, was seeking to vary by parol a written agreement.

*Howell, Q.C., and Metcalfe, for the plaintiff.*

*Munson, Q.C., for the defendant.*

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## PATERSON v. BROWN.

*Municipal elections—Disclaimer—Petition—New election.*

Appeal by Edward Brown from the decision of a County Court Judge declaring his election as mayor of the town of Portage la Prairie void, on the ground of want of the property qualification required by the Municipal Act.

The election was held on the 15th December, 1896, when Paterson and Brown were candidates, the latter receiving a majority of votes. On the 16th December, before the declaration of the poll, Paterson delivered to the returning officer a

protest against the election and return of Brown, on the ground that he had not the property qualification required, and claiming that he was himself properly elected. The returning officer, however, declared Brown duly elected.

On the 22nd December Brown delivered to the clerk of the municipality a disclaimer under the provisions of s. 249 of the Municipal Act, R. S. M. c. 100. A warrant for a new election issued on the 28th December, and on the 31st December Brown and Paterson were again nominated as candidates. On the 2nd January, 1897, a petition was filed by Paterson, in which he complained that the property qualification of Brown was not sufficient and his election invalid, but he did not claim to be himself entitled to the seat. This petition was served on the 4th January. The new election took place on the 7th January, when Brown again received a majority of the votes, and was declared elected.

The trial of the petition was afterwards proceeded with before the County Court Judge, who on the 6th March gave judgment overruling the objection raised on behalf of Brown, that, he having disclaimed under s. 249 of the Municipal Act, the matter was at an end, the seat vacant, and there was nothing for the petition to operate on; and deciding that Brown had not the necessary property qualification. Brown appealed to the full Court.

*Held*, that the appeal should be allowed with costs, the judgment of the County Court Judge set aside, and the petition dismissed with costs.

The respondent resigned before his election was complained of, as, under the Act, he had a right to do. Having done that, the seat was vacant, and a fresh election could at once be held. As the petitioner did not claim the seat, the respondent's resignation accomplished all that he sought by his petition, and the filing of it was unnecessary.

*Anderson*, for the petitioner.

*Cooper*, Q.C., for the respondent.

## HAZLEY v. McARTHUR.

*Executions—Priority of—Delay in executing writ by sheriff—Acquiescence in by plaintiff.*

Interpleader issue as to the priority between two writs of execution against goods.

Pope, the judgment debtor, being indebted to several creditors, an arrangement was made that he should give his promissory note to the plaintiff for the aggregate amount he owed, and the plaintiff should get judgment; Pope to continue his business and buy goods from the creditors, for which he was to pay cash; the judgment not to be executed until other creditors pressed Pope. Judgment was signed and execution sent to the sheriff on 17th March, 1894. The sheriff took no action on the writ until June, 1895, when he sent a warrant to his bailiff to make the amount of the writ. The bailiff did nothing towards executing the warrant, but, after keeping it for two or three months, he sent it back to the sheriff.

In March, 1896, the writ was returned to the plaintiff's solicitors for renewal; after renewal they sent it back to the sheriff, in a letter in which they said nothing more than that they enclosed the renewed writ. The sheriff stated that from first to last he received no instructions from the plaintiff to delay the execution of the writ, and he delayed enforcing it because he did not feel called on to press it without instructions to do so.

In April, 1896, an execution out of the County Court at the suit of McArthur against Pope was placed in the hands of the bailiff, who made a seizure under it, and soon afterwards Pope's goods were seized by the sheriff under Hazley's writ.

The County Court Judge held that the plaintiff's execution was not in the sheriff's hands to be executed, and had, therefore, lost its priority, and he entered a verdict for the defendant. The plaintiff appealed.

*Held*, that the appeal should be dismissed with costs. The only proper use of an execution is to enforce the collection of a debt, and to enforce it with a considerable degree of diligence. Every writ in the hands of a sheriff, which can be considered as properly in his hands, must be there to be executed. If it is not

so, then it is not in his hands for the purpose which an execution is intended to serve. It is not properly in his hands at all.

It does not seem that, in order to a writ losing its priority, there must have been express instructions not to proceed. There may be such a course of conduct, such delay, acquiesced in by the judgment creditor, as to have the same effect.

*Howell, Q.C., and Mathers, for the plaintiff.*

*Wilson and Huggard, for the defendant.*

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[DUBUC, J., 17TH JUNE, 1897.]

### BERGMAN v. NORTH-WEST ELECTRIC CO.

*Malicious prosecution—Reasonable and probable cause—Want of malice—  
Facts laid before counsel for advice.*

Action for malicious prosecution.

The plaintiff was charged, on the information of the superintendent of the defendant company, with stealing ninety colombs of electricity, the property of the company.

The charge was dismissed, on the ground that the Electric Light Inspection Act, 57 & 58 V. c. 89 (D.), under which the prosecution appeared to have been instituted, was not in force. The plaintiff then brought this action. The defendants pleaded that they had reasonable and probable cause for believing the matters charged in the information, and that they laid the facts of the case before counsel and acted *bona fide* in doing the act complained of, under his advice.

The plaintiff swore that he did not steal any electricity from the defendants, and attempted to show that they had acted with malice and without reasonable and probable cause in prosecuting him; he was contradicted on several points by employees of the company.

*Held*, on the evidence, that the defendants had reasonable and probable cause for believing that the plaintiff had unlaw-

fully consumed and used some of their electricity; also, that all the facts were fairly and correctly laid by the defendants before a competent counsel of good standing at the bar, and that they *bona fide* followed his advice.

On these grounds a verdict should be entered in favour of the defendants with costs of suit.

*Ravenga v. Mackintosh*, 2 B. & C. 694, and *Hewlett v. Cruchley*, 5 Taunt. 277, followed.

The quantity of electricity stolen was stated to be of the value of one cent; that could not be construed as evidence of malice; it rather showed want of malice. The intention in prosecuting the plaintiff was only to vindicate the company's rights and protect their interests.

*Perdue*, for the plaintiff.

*Tupper*, Q.C., and *Phippen*, for the defendants.

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[KILLAM, J., 17TH JUNE, 1897.]

### BERTRAND v. CANADIAN RUBBER CO.

*Bankruptcy and insolvency—Fraudulent preference—"Insolvent"—"Unable to pay debts in full"—Meaning of—Preferential security—Pressure.*

The plaintiff, assignee for the benefit of creditors of J. Lamonte, brought this action to have a mortgage of Lamonte's stock in trade, made in favour of the defendant company, declared void as against creditors of Lamonte.

The defendant company were creditors of Lamonte, and the plaintiff's allegation was that the mortgage was made when Lamonte was in insolvent circumstances and unable to pay his debts in full, with intent to give the company a preference over his other creditors.

*Held*, that judgment must be entered for the plaintiff with costs.



The first question was whether Lamonte was in insolvent circumstances or unable to pay his debts in full when he made the mortgage. The proper test of this was that expressed in *Davidson v. Douglas*, 15 Gr. 847; *Warnock v. Kloepper*, 14 O. R. 288; *Dominion Bank v. Cowan*, 14 O. R. 465.

Lamonte had commenced business about four years before his assignment, with a capital of \$500. When he made the mortgage he had a surplus, upon his valuation of his stock, of about \$1,000, besides a piece of land valued at \$750. He was carrying a stock of \$9,000 or \$10,000.

A creditor, as his claim was about maturing, notified Lamonte that he insisted upon payment; other considerable sums were already overdue, or about maturing, which it was impossible to meet at once. Taking all the circumstances into consideration, the inference was that the debtor could not, at the time of making the mortgage, dispose of his assets for sufficient to meet his liabilities, and he must be considered as having then been in insolvent circumstances.

The mortgage to the defendant company was made with intent to give that company a preference over other creditors. The suggestion to secure the company came from the debtor voluntarily. There was no pressure. The whole scheme was intended for the benefit of the creditors to whom the security was offered.

The mortgage must be declared void as against the plaintiff, and he would be entitled to the proceeds of the mortgaged property brought into Court.

*Ewart, Q.C., and Phippen, for the plaintiff.*

*Hough, Q.C., and Bradshaw, for the defendants.*

[KILLAM, J., 21ST JUNE, 1897.]

BUCKNAM v. STEWART.

*Limitation of actions—Mortgage—Actual possession—Real Property Limitation Act.*

Issue as to whether the right of the defendant, as mortgagee of land, to make an entry upon, or to bring an action or suit to recover, the mortgaged property, had ceased to exist on 27th October, 1896.

The defendant conveyed the land, in fee, to T. A. Cole on 11th October, 1888, and on the same day Cole granted it back to the defendant, by way of mortgage to secure payment of a portion of the purchase money. T. A. Cole conveyed the land to James Cole, who conveyed it to the plaintiff on 30th June, 1896. The conveyances and the mortgage were under the Act respecting Short Forms of Indentures, and included provisos that the mortgagee, on default of payment for one month, might, on giving notice, enter on and lease or sell the land, and that, until default of payment, the mortgagor should have quiet possession.

No portion of the principal or interest was ever paid. The land, when the first of the conveyances was executed, was wild land, in a state of nature, vacant and unimproved, and so remained until 30th June, 1896, when the plaintiff entered into occupation.

The plaintiff contended that, by virtue of the conveyance to T. A. Cole, and the proviso in the mortgage for possession by the mortgagor until default, the land had, from 11th October, 1888, been constructively in the possession of T. A. Cole and his assigns, and that the defendant had lost any right of entry or right to recover the same through the provisions of the Real Property Limitation Act, 46 & 47 V. c. 26; R. S. M. c. 89.

*Held*, that the question was concluded by *Smith v. Lloyd*, 9 Ex. 562: "There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute:" *per Parke, B.*, at p. 572.

There having never been any person in actual possession of the property until 30th June, 1896, the statute did not begin to run against the defendant until then, and his right of entry or to bring an action to recover possession still continued.

*Doe d. McLean v. Fish*, 5 U. C. R. 295, dissented from.

*Delaney v. Canadian Pacific R. W. Co.*, 21 O. R. 11, followed.

Judgment for the defendant.

*Tupper*, Q.C., and *Phippen*, for the plaintiff.

*Haggart*, Q.C., and *Wilson*, for the defendant.

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[BAIN, J., 15TH JUNE, 1897.]

### DOBSON v. LEASK.

*Security for costs—Plaintiff out of jurisdiction—Land in jurisdiction—Rule 500—Evidence—Affidavit—Information and belief.*

Appeal from an order of the referee in Chambers. The plaintiff, who sued as administrator of the estate of Alexander Leask, deceased, resided out of the jurisdiction. The defendant having issued a præcipe order for security for costs, the plaintiff moved before the referee to set it aside. The estate of the deceased consisted of a farm in Manitoba, stated to be worth \$3,000, unincumbered, and vested in the plaintiff as administrator.

The referee set aside the order with costs, and the defendant appealed, on the ground that there was no evidence before the referee as to the value of the land belonging to the estate of the deceased, nor that the land was unincumbered.

In the plaintiff's affidavit, filed on the motion, he stated that the deceased was at the time of his death the owner of a half section of land in Manitoba, and that, according to the best of his knowledge, information, and belief, this land was of the value of \$3,000, and that it was unincumbered, as he was informed and verily believed.

Rule 500 of the Queen's Bench Act, 1895, provides that affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted.

*Held*, that there was no evidence before the referee to show that the land was of a value sufficient to satisfy all possible costs of the defendant: *Wood v. Guilette*, 10 Man. L. R. 570.

It might be inferred, perhaps, from the plaintiff's statement, that he had some personal knowledge of the land and of its value, but clearly he did not know of his own knowledge whether it was incumbered or not. On this point the affidavit was altogether on information and belief.

The objection to the affidavit was one of substance, and, as it had been raised, effect must be given to it. In matters of substance there must be a strict compliance with the Rules: *Bidder v. Bridges*, 26 Ch. D. 1; *Bonnard v. Perryman*, [1891] 2 Ch. 269.

Appeal allowed.

*Hough*, Q.C., for the plaintiff.

*Culver*, Q.C., for the defendant.

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## ONTARIO.

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### Supreme Court of Judicature.

### COURT OF APPEAL.

DIVISIONAL COURT.]

[30TH JUNE, 1897.

#### IRVINE v. MACAULAY.

*Limitation of actions—Vendor and purchaser—Purchaser in possession—  
Implied trust—Tenant at will—R. S. O. c. 111, s. 5, s.-ss. 7, 8.*

The 8th sub-section of s. 5 of R. S. O. c. 111 applies to the case of an implied trust, and a purchaser in possession with the assent of his vendor is therefore not a tenant at will within the meaning of s.-s. 7.

Judgment of the Court below, 28 O. R. 92, 16 Occ. N. 373, affirmed.

*Shepley, Q.C., and H. W. Delaney, for the appellants.*

*Clute, Q.C., for the respondent.*

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#### BOURNE v. O'DONOHUE.

*Judgment by default—Setting aside—Discretion—Terms—Defence—Merits  
—Rule 796.*

Under Rule 796 the Court has a discretion to set aside any judgment by default upon proper terms. Where such judgment is a final one, the Court is not in a position to exercise a discretion, unless the defendant shows at least some such plausible defence as he would have to show on resisting a motion for judgment under Rule 789. The Court will not try the defence so asserted, but affidavits may be received, or the defendant may

be cross-examined upon his own, for the purpose of enabling the Court to determine how far there is a *bona fide* defence of the nature of that set up; and, *a fortiori*, his application may be met by documents under his own hand, not explained or answered, showing that such defence is non-existent.

Order of the Court below affirmed.

*Meek*, for the appellant.

*Masten*, for the respondents.

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### ELMSLEY v. HARRISON.

*Amendment—Pleading—New case made at the trial—Statute of Frauds.*

The decision of a Divisional Court that the defendant was, under the circumstances of the case, entitled to set up the Statute of Frauds, and thereby to defeat the action, was affirmed on appeal.

*E. T. English*, for the appellants.

*E. D. Armour*, Q.C., and *E. B. Brown*, for the respondent.

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### KREH v. BISHOP.

*Partnership—What constitutes—Division of gross receipts—Employment of servants—Evidence—Principal and agent—Partnership by estoppel.*

An appeal by the plaintiff from the judgment of a Divisional Court, *ante* 171, reversing the judgment of the trial Judge and dismissing the action as against the defendant Puddicombe.

The plaintiff sued for wages as a groom employed in a livery stable. He was employed by the defendant Bishop, but brought the action against both defendants, alleging that they were partners in the business. At the trial judgment was given against both defendants, and the defendant Bishop did not appeal.

The appellant contended that the defendants were in law partners, or that the defendant Bishop was the agent of the defendant Puddicombe.

This Court unanimously dismissed the appeal.

*Per* BURTON, C.J.O.—There was no evidence to justify the finding that Puddicombe had held himself out to the plaintiff

as a partner. There may be a partnership without community of profit and loss, and notwithstanding that the persons associated together divide gross receipts only. There was no attempt to impugn the veracity of Puddicombe as to the true nature of the arrangement. If such an arrangement had been reduced to writing, there would be no pretence, in the absence of fraud, for inferring that it constituted a partnership. Even if the parties had shared the net profits, instead of the receipts, that would not be sufficient in itself to raise an inference of either partnership or agency. The case does not differ from the ordinary case of letting a farm upon shares, the landlord and tenant dividing the products in certain proportions. The plaintiff is not entitled to shift his ground and proceed against Puddicombe as principal, whilst he still retains his judgment against Bishop as agent. He might elect to proceed against either, but a judgment recovered against one is a complete bar to recovery against the other. But, upon the evidence, the plaintiff ought to fail in any suit against Puddicombe as his debtor in any character.

*Per OSLER, J.A.*—There was no agreement between Puddicombe and Bishop that they should be partners in the business managed by Bishop, in which he employed the plaintiff. It is more consistent with the evidence that the business was so carried on as not to create a partnership between them than otherwise, that is to say, it continued to be carried on as it was originally begun, excluding any intention of becoming partners, and it was not so carried on as to warrant the contention of the plaintiff that as to him there ever was a partnership by estoppel.

*Per Moss, J.A.*—At this stage there are serious difficulties in the way of the plaintiff being permitted to abandon his claim against the defendants jointly and against the defendant Bishop, wholly, and claim against the defendant Puddicombe solely. The right to judgment against the latter must depend upon proof of a partnership, real or ostensible, between the defendants, the onus resting upon the plaintiff. The evidence fails to establish a partnership in fact, and there was not on the part of Puddicombe any holding out of himself to the plaintiff as a partner in the business upon the faith of which the plaintiff was induced to engage himself.

*W. M. Douglas*, for the appellant.

*W. R. Riddell*, for the respondent.

FERGUSON, J.]

HALL v. PUBLIC SCHOOL TRUSTEES FOR UNITED  
SCHOOL SECTION TWO OF THE TOWNSHIP  
OF STISED.

*Public schools—Accommodation—54 V. c. 55, s. 40, s.-s. 3—Guardian—  
“Boarding-out” agreement.*

The custodian of a child under a “boarding-out” agreement to clothe, maintain, and educate him, is not his guardian within the meaning of s.-s. 3 of s. 40 of the Public Schools Act, 54 V. c. 55, and the trustees of the school section within which the custodian resides need not provide school accommodation for the child.

Judgment of FERGUSON, J., 28 O. R. 127, 16 Occ. N. 392, affirmed.

*Coatsworth and F. E. Hodgins, for the appellant.*

*Shepley, Q.C., for the respondents.*

ROSE, J.]

[14TH JUNE, 1897.]

BARBER v. McCUAIG.

*Mortgage—Sale of equity of redemption—Transfer to mortgagee of covenant to indemnify—Principal and surety.*

A mortgagor of lands sold the equity of redemption, taking a covenant from the purchaser to pay off the mortgage, which covenant he assigned to the mortgagee. Afterwards, the latter, without the knowledge of the mortgagor, took a transfer from the purchaser of certain covenants of indemnity against the same mortgage, given to him by sub-purchasers, and, in consideration thereof, agreed to exhaust her remedies against the sub-purchasers before proceeding against him.

*Held*, that the transfer to the mortgagee by the mortgagor of the first purchaser's covenant to indemnify against the mortgage did not put him, the mortgagor, in the position of a surety only, or affect his liability to the mortgagee on his own covenant in the mortgage.

If the agreement between the mortgagee and the first purchaser had prejudiced the mortgagor by postponing the remedy of the latter on the first purchaser's covenant to indemnify, that was a matter of damages merely.



Judgment of ROSE, J., reversed.

*W. H. Irving*, for the plaintiff, appellant.

*Aylesworth*, Q.C., for the defendant.

ROBERTSON, J.]

[30TH JUNE, 1897.

### MCLEOD v. NOBLE.

*Appeal—Interim injunction—Contempt—Practice—Ex parte motion—Parliamentary elections—Recount—Jurisdiction of High Court.*

Where, after the expiration by effluxion of time of an interim injunction order, proceedings are taken against a party to the action to commit him for contempt for disobeying the order, an appeal by him against the interim order will lie; BURTON, C.J. O., dissenting.

A Judge of the High Court has no jurisdiction to restrain by injunction a County Court Judge and returning officer from holding a recount of the ballots cast at an election for the House of Commons; BURTON, C.J.O., expressing no opinion on this point.

Where an injunction is applied for *ex parte*, counsel who appear and desire to be heard in opposition to the application should be heard.

Judgment of ROBERTSON, J., reversed.

*William Macdonald*, *R. A. Grant*, and *L. G. McCarthy*, for the appellant.

*Aylesworth*, Q.C., for the respondent.

STREET, J.]

### *In re* CENTRAL BANK OF CANADA.

### HOGABOOM'S CASE.

*Winding-up Act—Payment out of Court—Right of Receiver-General to compel repayment—Court funds—Payment to person not entitled—Jurisdiction of Court to compel repayment—R. S. C. c. 129, ss. 40, 41—55 & 56 V. c. 28, s. 2.*

Where the liquidators of an insolvent bank have passed their final accounts and have paid into Court the balance in

their hands, and that balance is by inadvertence paid out of Court to a person not entitled to it, the Receiver-General has such an interest in the fund that he may, even before three years from the time of payment in have expired, apply to the Court for an order for repayment into Court of the fund.

The Court has also inherent jurisdiction to compel the repayment into Court of moneys improperly obtained out of Court.

Judgment of STREET, J., reversed.

Moss, Q.C., and F. E. Hodgins, for the appellant.

S. H. Blake, Q.C., and W. R. Smyth, for the respondents, the executors of the Hogaboom estate.

George S. Holmsted, liquidator, in person.

## HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., MACMAHON, J., 17TH JUNE, 1897.]

### DALE v. PEOPLE'S LOAN AND DEPOSIT CO.

*Bills of sale—Transfer of chattels from husband to wife—"Actual and continued change of possession"—R. S. O. c. 125, s. 5—Gift—Delivery.*

An appeal by the defendants, execution creditors, from the judgment of ARMOUR, C.J., in favour of the plaintiff, the claimant, in an interpleader issue, directed to be tried upon the application of a sheriff who had seized certain furniture and animals under the execution of the defendants against the husband of the claimant, who claimed the furniture as having been purchased by her from her husband, and the animals as the progeny of a brood-mare which was a wedding-present from him. The transactions in question were previous to the passing of 55 V. c. 26.

*Held*, applying and following *Ramsay v. Margrett*, [1894] 2 Q. B. 18, and distinguishing *Hogaboom v. Graydon*, 26 O. R. 298, that the purchase of the furniture did not come within R. S. O. c. 125, s. 5, as both the property and possession passed by the purchase, and there was therefore an actual and continued change of possession.

*Held*, as to the animals, that upon the evidence there was a good gift, completed by delivery.

*Aylesworth*, Q.C., for the appellants.

*W. Nesbitt*, for the plaintiff.

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[BOYD, C., MEREDITH, C.J., MACMAHON, J., 30TH JUNE, 1897.]

MCLEOD v. NOBLE.

*Parliamentary elections—Dominion Elections Act—Recount of ballots—Applicant for recount—Rights and remedies—Injunction—Jurisdiction of Provincial Courts—Interference with recount—Disobedience of order made without jurisdiction—Nullity—Motion to commit.*

Motions by the plaintiff to commit the defendant B., who was the returning officer at an election of a member of the House of Commons for the Dominion of Canada, and to commit a barrister, who acted as counsel or agent for the defendant N. at a recount held by the Judge of the County Court of Ontario, under the Dominion Elections Act, of the votes cast at such election, for disobedience and contempt of an order of the High Court of Justice made by ROBERTSON, J., on the 15th February, 1897, restraining the defendants until the 18th February, 1897, from proceeding with the recount, and restraining the defendant B. until the 18th February from attending with the ballots before the County Court Judge, and from making a return to the Clerk of the Crown in Chancery until a certificate of a recount of the same ballots should be received from the Judge of the District Court of Muskoka, from whom the plaintiff had obtained an appointment for a recount previously to the obtaining of an appointment from the County Court Judge by the defendant N., but returnable on a later day. The contempt alleged against the defendant B. was direct disobedience to the order by producing the ballots before the County Court Judge, and, when he had concluded his recount, forwarding them to the clerk of the Crown in Chancery; and that alleged against the counsel for the defendant N. was the counselling, aiding, and abetting the disobedience of the order.

*Held*, that the plaintiff had no particular specific legal right as applicant for a recount which entitled him to claim a specific legal remedy in the Courts.

2. That the Provincial Court had no jurisdiction to enjoin the prosecution of proceedings connected with controverted elections of the Dominion, such as a recount under s. 64 of R. S. C. c. 8, which, though it appears in the Elections Act, is in *pari materia* with c. 9, relating to controverted elections.

3. That the County Judge having issued his appointment and summons and having jurisdiction in the premises, the procuring of the order of the High Court by way of injunction was an unwarrantable attempt to interfere with the due course of the election.

4. That the order by way of injunction, being made without jurisdiction, was extra-judicial and void—a thing of naught, of which there could not be disobedience.

5. That the motion to commit was without foundation, and the order, being absolutely without jurisdiction, might be treated as a nullity.

Motion dismissed with costs.

*Aylesworth*, Q.C., for the plaintiff.

*E. D. Armour*, Q.C., and *L. G. McCarthy*, for Mr. D'Alton McCarthy.

*William Macdonald* and *R. A. Grant*, for the defendant Bruce.

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[FERGUSON, J., MACMAHON, J., 80TH JUNE, 1897.]

### MAY v. WERDEN.

*Security for costs—Prior action—Costs unpaid—New plaintiff—Notice—Nominal and insolvent plaintiff.*

Security for costs may be ordered where the costs of a former action for the same cause are unpaid, even although the actions are not between precisely the same parties, if the plaintiffs are suing substantially by virtue of the same alleged title.

*McCabe v. Bank of Ireland*, 14 App. Cas. 413, followed.

And where the title to property, the subject of the present and a former action of ejectment, was shifted into the hands of the present plaintiff, to evade, if possible, the effect of an order requiring the plaintiff in the former action to give security

for costs—the former action having been dismissed for default of such security—and it appeared that the present plaintiff knew the history of the prior litigation, an order for security for costs was affirmed.

The order was also maintainable upon the ground that the plaintiff was a person of no substance, and the action brought mainly, if not entirely, for the benefit of some unknown and unnamed person, not a party to the record.

*J. A. Donovan*, for the plaintiff.

*W. E. Middleton* and *J. M. Godfrey*, for the defendant.

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IN CHAMBERS.

[ROSE, J., 29TH JUNE, 1897.]

REGINA *ex rel.* MACKENZIE v. DUROSS.

*Municipal elections—Councillor—Property qualification—Real ownership.*

An appeal by the defendant from an order of Mr. Cartwright, an official referee, sitting for the Master in Chambers, declaring that the defendant was not qualified to be elected to the office of councillor for the township of Oliver, by reason of the fact that he was not in truth a freeholder in the township, or otherwise possessed of any sufficient property qualification. The defendant had been a resident of, and had resided continuously on, lot 18 in the 2nd concession of the township of Oliver for 17 years prior to the election. During such time he had been assessed for and had paid the municipal taxes on the land. The property had, however, been purchased and patented in the name of his daughter. He stated that she never resided on the land, that she always acknowledged him to be the owner, and that he had never acknowledged her to have any right or title thereto. A mortgage upon the land was executed by the daughter for \$500. The defendant stated that the money was paid to him and was used by him in making improvements on the land. The relator stated that the son of the defendant had worked the farm and was the manager and owner of the chattels thereon. A chattel mortgage was made by both father and son.

*Held*, that if the property was put in the name of the daughter to prevent creditors reaching it, this would support the conclusion that the father was in fact the owner of the property, and used the daughter as trustee for himself. While this would enable creditors to reach the property, it did not assist the relator in an attack upon the property qualification of the defendant. Assuming that upon this motion an inquiry might be had into the real ownership; on the uncontradicted statement of the defendant he had shown himself to be the owner of the property, entitled, if in no other way, by length of possession. The fact that he had been assessed and had paid taxes in respect of the property for so many years was very potent in his favour.

Appeal allowed with costs.

*H. M. Mowat*, for the appellant.

*Aylesworth*, Q.C., for the relator.

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REGINA *ex rel.* McKENZIE v. MARTIN.

*Municipal elections—Qualification of voters—Finality of voters' list.*

An appeal by the relator from an order of Mr. Cartwright, an official referee, sitting for the Master in Chambers, dismissing a motion by the relator to void the election of the defendant as a councillor for the township of Oliver, upon the ground that the defendant did not receive at the election a majority of the votes of the duly qualified electors entitled to vote at the election.

*Held*, that the voters' list was final and could not be called in question in the present proceedings.

*Regina ex rel. St. Louis v. Reaume*, 26 O. R. at p. 462, referred to.

Appeal dismissed with costs.

*Aylesworth*, Q.C., for the appellant.

*H. M. Mowat*, for the defendant.

[MR. CARTWRIGHT, OFFICIAL REFEREE, 25TH MAY, 1897.]

REGINA *ex rel.* SCARLETT v. WICKS.

*Municipal elections—Alderman of city—Property qualification—Incumbrances—Charge for local improvements—Bye-election—Assessment roll—Adoption by council—Costs where election avoided.*

Motion to avoid the election of the respondent as an alderman for St. David's ward, in the city of Guelph.

The respondent, having been in February, 1897, unseated for want of qualification, was re-elected on the 23rd March. He had his assessment increased in November, 1896, with a view to cure the objection which was successfully taken after the first election.

Two objections were raised to the second election, viz.:—

(1) That the increased assessment on the roll for 1897 was of no avail, as that roll, not having been approved of by the council until after the second election, was not the roll governing that election.

(2) That, even if that roll was in force, the respondent was still disqualified by reason of his property being assessed for local improvements to the amount of \$100, and his assessment being thereby reduced below the limit fixed by statute.

The motion was argued before the referee, sitting for the Master in Chambers, on the 19th May, 1897.

*C. J. Holman*, for the relator, relied as to the second objection on *Cumberland v. Kearns*, 17 A. R. 287; *Re Graydon and Hammill*, 20 O. R. 199; and *Armstrong v. Auger*, 21 O. R. 98.

*W. M. Douglas*, for the respondent, referred to *Les Ecclesiastiques de St. Sulpice de Montreal v. The City of Montreal*, 16 S. C. R. 399, 14 App. Cas. 660.

MR. CARTWRIGHT—Having regard to the language used by the Court in the three cases relied on by Mr. Holman, I think the second objection entitled to prevail. I think it must be conceded that the owner has got the benefit of the increased value given to his property by the local improvements, and of the higher assessment of his property as a consequence of that increased value. In return for that, as said by Mr. Justice OSLER in *Cumberland v. Kearns*, 17 A. R. 287, he has, in effect, given back a mortgage to the city, which at present is wholly

due and unpaid. Looking at the language of s. 78 of the Consolidated Municipal Act, 1892, in the light of these decisions, I am of opinion that the respondent is not, in any event, duly qualified to hold the office of an alderman for the city of Guelph, and that the election must be set aside. It cannot make any difference whether the charge stands against the land in favour of the city, or whether the owner gave a mortgage to a private person, and paid off that charge.

It may be proper that I should also express my opinion on the other point, viz., whether the roll adopted by the council in this present month of May, some weeks after the election, can be considered to be the roll on which the respondent may qualify. If he can do so, then the by-law of adoption must be retrospective, as, by s.-s. (2) of s. 52 of 55 V. c. 48, under the facts of the case, the roll was not in force until adopted by the council as therein provided. But I see no ground for giving the adoption any such effect. To do so would be in conflict with what was said in *Regina ex rel. Clancey v. McIntosh*, 46 U. C. R. at p. 105. It could not seriously be argued that the roll for 1897 could have been used at the election in March as the roll of qualified voters; and, therefore, it could not be used as the roll of qualified candidates seeking election as members of the council. It may further be remarked that if the contention of the respondent in this case is right, it would rest with a council to say whether a person elected at a bye-election was to be considered as qualified or disqualified by giving or refusing adoption of the roll, as they saw fit.

On both grounds, therefore, the respondent must be declared to have been not duly elected, and the election must be set aside and a new election ordered.

I have considered the question of costs. But, in view of the language of the judgment in *Regina ex rel. Clancey v. McIntosh*, supra, I must say that "the relator has maintained his position, and is therefore entitled to his costs, which the respondent might possibly have avoided by disclaiming in due time."



## NEW BRUNSWICK.

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In the Supreme Court.

IN EQUITY.

[BARKER, J., 10TH JULY, 1897.]

MITCHELL v. KINNEAR.

*Mortgage—Power of sale—Purchase by mortgagee—Subsequent valid exercise of power—Surplus after paying mortgage—Mortgagee in possession—Account—Interest.*

Where a mortgagee, in the exercise of a power of sale, sold the mortgaged property to himself, and subsequently sold a portion of the premises to a third person for a sum in excess of the amount due on the mortgage, and received rent from the remaining part, he was held liable to account for the surplus from the second sale and the rent, with interest.

*M. G. Teed*, for the plaintiff.

*Powell, Q.C.*, for the defendants.

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## MANITOBA.

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In the Queen's Bench.

[FULL COURT, 2ND JULY, 1897.]

WALSH v. NORTH-WEST ELECTRIC CO.

*Company—Issue of shares at a discount—Validity of—Forfeiture of shares set aside.*

The defendant company was incorporated in June, 1889; on 15th July, at a meeting of the directors, a resolution was

passed by which two trustees, Walsh and Dexter, were appointed, and it was directed that 900 shares of the company's stock should be issued to them, fully paid up and non-assessable, for the purposes of a certain agreement. In October, 1889, the defendants entered into a contract with the Edison Electric Light Company, by which the latter company was to license the former to use certain patents, for the considerations stated, and on the terms set forth; further, that the defendants' shares should be of the par value of \$100 each, and be issued after full payment in cash only.

In pursuance of a resolution passed at a meeting of the directors, the trustees transferred to the plaintiff 160 shares of stock held by them, and there was issued to the plaintiff, under the seal of the company, a document certifying that she was the owner of 160 shares, fully paid and non-assessable, of the capital stock of the company, the consideration paid being \$8,200. After the issue of the certificate to the plaintiff, she was allowed to attend a meeting of shareholders and to vote as a holder of the shares. She also transferred two of them to her husband, and this transfer was accepted and recognized by the defendants' officers.

Subsequently, the company being in difficulties, the directors were advised that the shares issued to the plaintiff were subject to calls, and they made two calls of 20 per cent. each upon the plaintiff, but she did not pay them, and further proceedings were taken, under which the company claimed that the plaintiff's right to them had been forfeited, and she was refused the privilege of voting thereon at a meeting of shareholders.

This action was brought to have it declared that the plaintiff remained the holder of 158 shares of the capital stock of the company, fully paid up and unassessable, or, in the alternative, for judgment for a return of the moneys paid thereon. For the defence it was claimed that the whole issue of the shares as paid up and non-assessable was invalid; that the directors had no power to allow the transfer and allotment of the shares as fully paid up for less than the full nominal value thereof; that the transaction was fraudulent on the part of the trustees and directors; and that the directors could not thus act in violation of the agreement with the Edison Company.

The action was tried before TAYLOR, C.J., who held the shares liable to call under *Ex p. Daniell*, 22 Beav. 46, and dismissed the action.

The plaintiff appealed to the full Court.

It appeared from the evidence that 105 of the plaintiff's forfeited shares had since been disposed of by the company, but the remaining 58 shares were still held by the company. The holders of the 105 shares were not parties to the action.

*Held*, that the transaction was one coming within the terms "sale," "allotment," or "issue" of shares "at a discount," referred to in s. 30 of The Manitoba Joint Stock Companies' Act, R. S. M. c. 25. For the purposes of this question it was clear from the decision in *In re Licensed Victuallers' Mutual Trading Association*, 42 Ch. D. 1, that it is the real nature of the transaction, and not the language used, which governs. The transaction really was a sale by the trustees and directors of shares on which nothing had been paid, as fully paid up and non-assessable, for \$20 per share.

Putting aside, for the time being, the position of Walsh as a trustee and director as well as husband of the vendee and agent of his wife, the plaintiff, and the contract with the Edison Company, the transaction appeared to be one which the directors had power to carry out so as to bind the company; there was a real consideration from the plaintiff; it was not the mere fact of the allotment being at a discount which made it voidable.

The judgment dismissing the action should be vacated, and it should be declared that the plaintiff was, at the commencement of the action, entitled to 58 shares of the capital stock of the defendant company, fully paid up and non-assessable, and that the proceedings taken for the forfeiture of the shares were illegal and void, but it should be provided that the judgment was not to prejudice the right of the company to seek compensation from the plaintiff alone, or jointly with others, for the alleged fraud or breach of trust claimed to have been involved in the transfer of the shares to the plaintiff, or to prejudice any claim of the plaintiff in respect of the remaining 105 shares claimed by the statement of claim, with costs of the action and appeal.

[DUBUC, J., 10TH JULY, 1897.]

## FOSTER v. MUNICIPALITY OF LANSDOWNE.

*Municipal corporations—Drainage—Damage by drain—Demurrer to statement of claim—Procedure—Action—Arbitration.*

In his statement of claim the plaintiff alleged that the defendants, by constructing in a negligent and improper manner, a ditch, for drainage purposes, had overflowed his land, by reason of which he suffered damages; and claimed \$1,000.

The defendants demurred to the whole of the plaintiff's statement of claim, on the ground, amongst others, that even if the plaintiff suffered the damages complained of by reason of the ditch or the faulty construction thereof, he had no right of action, but should have availed himself of the provisions of the Municipal Act respecting arbitration, to obtain compensation.

Section 665 of the Municipal Act, R. S. M. c. 100, provides that in case real property is entered upon, taken, or used by a municipal corporation in the exercise of any of its powers, or injuriously affected by the exercise of any of its powers, the council shall make compensation for any damages necessarily resulting from the exercise of such powers, and any claim for such compensation, if not agreed upon, shall be determined by arbitration under the Act.

*Held*, that if the alleged damage was claimed as resulting merely from the due and proper exercise of the power of the council, the plaintiff would be bound to seek compensation by arbitration as provided for by the statute, and the action would not lie; but, as the plaintiff charged negligence and alleged that the damage resulted, not from the mere construction of the ditch, but from its being constructed in a negligent and improper manner, he was entitled to bring his action and might proceed with it.

*McGarvey v. Town of Strathroy*, 10 A. R. 631, and *Acheson v. Portage la Prairie*, 9 Man. L. R. 192, 18 C. L. T. 221, followed.

Demurrer overruled with costs.

*Metcalf*, for the plaintiff.

*Cameron*, for the defendants.

## NORTH-WEST TERRITORIES

## In the Supreme Court.

[THE JUSTICES IN BANC, 5TH DECEMBER, 1895.]

MASSEY v. McCLELLAND.

BAKER v. McCLELLAND.

*Statutes—Non-retroactivity—Execution—Exemption—Revised Ordinances,  
N. W. T., c. 45, s. 1, s.-s. 9—57 & 58 V. c. 29, s. 2.*

Special case.

The plaintiffs were respectively execution creditors of the defendant for sums each exceeding \$200.

The Massey execution was received by the sheriff on 7th October, 1893, and was renewed on 21st August, 1895. A copy was transmitted to the registrar of the Assiniboia Land Registration district, under s. 94 of the Territories Real Property Act, and was received by him on the 14th October, 1898.

The Baker execution was received by the sheriff on the 6th March, 1895, and a copy transmitted by the sheriff under s. 92 of the Land Titles Act, 1894, was received by the registrar on 8th March, 1895.

Both writs were transmitted by the sheriff to the deputy sheriff of the Moose Jaw sub-district, within which the lands were situated, pursuant to Ordinance No. 7 of 1894, s. 5 (a).

The defendant, in August, 1891, obtained entry for the lands sought to be affected by the writs, as a homestead, under the Dominion Lands Act. The lands in question consisted of a quarter section not containing more than 160 acres. The defendant having fulfilled the requirements of the Act, a patent issued to him, dated 19th December, 1893, and was received by the registrar on the 22nd January, 1894.

The defendant had resided on the lands ever since he obtained his entry.

On 17th September, 1895, the deputy-sheriff went on the lands, and afterwards, on the same day, by notice and advertisement, as required by s. 345 of the Judicature Ordinance, stated that he would offer the land for sale on 21st December, 1895.

The question stated by the parties was whether the lands were exempt from execution under c. 45 of the Revised Ordinances and 57 & 58 V. c. 29.

In *Re Claxton*, 1 N. W. T. Reps., pt. 2, p. 88, it was decided that s.-s. 9 of s. 1 of this Ordinance was *ultra vires*.

But s. 2 of 57 & 58 V. c. 29 provides that "any provisions which have been heretofore enacted by the Legislative Assembly of the North-West Territories and are not repealed, purporting to exempt real property in the North-West Territories from seizure by virtue of writs of execution, and the validity of which has been questioned or may be open to question by reason of their repugnancy to the provisions of the Act hereby repealed" (the Homestead Exemption Act) "shall hereafter be deemed to be valid and shall have force and effect as law." This Act was assented to on the 28rd July, 1894.

*Held*, that this enactment was not retroactive, and the exemption Ordinance, s.-s. 9, was not valid in October, 1898, and the lands were subject to the Massey execution, but not to the Baker execution, which was first delivered to the sheriff after the passing of c. 29.

*Per* McGUIRE, J.—On the writ being delivered to the sheriff on 7th October, 1898, he could have done whatever was necessary to constitute an inception of execution, whether by going on the land, or advertising, or otherwise. The plaintiff Massey had then a right, and had begun the exercise of it, whether he promptly followed it up or not; and that was sufficient.

*Clarkson v. Sterling*, 15 A. R. 284, followed.

*Per* WETMORE, J.—On the 14th October, 1898, when the copy of the execution and accompanying memorandum were delivered to the registrar, a charge was created on the lands in favour of the execution creditor. That created a substantial right in his favour, which was not altered by the statute.

*H. A. Robson*, for the plaintiff Massey.

*Secord*, Q.C., for the defendant.

[5TH JUNE, 1896.]

## REGINA v. THOMPSON.

*Criminal law—Perjury—Indictment—Charge that false evidence given before coroner—Evidence given before coroner and jury—Variance—Criminal Code, ss. 611, 723—Admissions of prisoner—Evidence taken before justice of the peace—Absence of objection—Canada Evidence Act, 1893, s. 5—Admissibility of evidence.*

Crown case reserved.

The prisoner was charged on two counts, the first being that he had committed perjury on the inquest or inquiry before Andrew J. Rutledge, one of Her Majesty's coroners in and for the North-West Territories, concerning the death of one Sarah Jane Thompson, held at Moosomin on the 30th October, 1895, by swearing that all night previous to his sister Sarah Jane Thompson's death, he was awake attending to a colt for a spavin, and did not sleep at all.

*Held*, having regard to ss. 611 and 723 of the Criminal Code, that the circumstance that the evidence was given before a coroner *and jury*, instead of before a coroner alone, as charged, did not vitiate the count; and therefore the inquisition offered in evidence was properly received and the first count properly submitted to the jury.

The prisoner, in giving evidence before a justice of the peace, subsequently to the inquest, swore that his statement made before the coroner was a lie. It was objected that admissions made by him on the hearing before the justice were inadmissible as evidence against him.

By s. 5 of the Canada Evidence Act, 1893, it is provided: "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him. . . . Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceedings thereafter instituted against him other than a prosecution for perjury in giving such evidence."

*Held*, that a witness cannot refuse or object to answer any question, and it would be of no avail to object. Everybody is supposed to know the law, and knowing that, he is bound by

the law to answer any question, whether the answer may criminate him or not. He is deemed also to know that the same law protects him from the use against him in any prosecution of an answer by which he criminales himself. The witness need not object to answer in order to avail himself of the enactment "that no evidence so given shall be used," etc. Therefore the evidence of the prisoner's admission in his testimony before the justice ought to have been struck out or withdrawn from the consideration of the jury.

*Regina v. Sloggett*, 8 Dears. C. C. 656, referred to.

New trial on the first count ordered.

*Gwillim*, for the Crown.

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### LIMOGES v. CAMPBELL.

*Executions—Priorities—Territories Real Property Act, s. 94—Delivery of copies of executions to registrar—Sale by sheriff under execution—Expiry of writs—Advertising—Time—Distribution of proceeds of sale—Creditors' Relief Act—Costs.*

An appeal from an order of WETMORE, J., upon an application by the sheriff of the judicial district of Eastern Assiniboia to have determined the rights of several execution creditors to certain moneys levied by him under execution against the defendant's lands.

Under the provisions of s. 94 of the Territories Real Property Act, as amended by 51 V. c. 20, s. 16, certified copies of certain executions, accompanied by a memorandum of the lands sought to be charged, being the lands from which the moneys in question were realized, were delivered by the sheriff to the registrar in a certain order, but copies of other executions in the sheriff's hands were not delivered at all. Section 94, as amended, provides as follows: "Every sheriff . . . shall, after the delivery to him of any writ or process affecting land, . . . deliver a copy of every such writ or process . . . certified under his hand, together with a memorandum in writing of the lands intended to be charged thereby, to the registrar within whose district such lands are situate, and no land shall be bound by any such writ or other process, until such copy and memorandum have been so delivered; and the registrar shall thereupon . . . enter a memorandum thereof in



the register ; and from and after the delivery of a copy of any such writ or other process and memorandum to the registrar, the same shall operate as a caveat against the transfer by the owner of the land mentioned in such memorandum, or of any interest he has therein ; and no transfer shall be made by him of such land or interest therein except subject to such writ or other process."

*Held*, by WETMORE, J., that the lands were bound by the several executions in the order in which the copies were delivered, and therefore that the several executions must take priority in that order.

*Held*, by the Court on appeal, that the words "no land shall be bound . . . until such copy and memorandum have been so delivered" should be taken to mean merely that for the purposes of the Act alone they should not be bound until such delivery. The Act did not contemplate that the procedure under executions should be interfered with to any greater extent than was necessary for the purposes of the Act, and for these purposes it is not necessary to provide that priority shall be given to executions in the order in which copies are delivered to the registrar. The reasonable construction of s. 94 is that it merely provides that in case of any dealing with the land by the execution debtor, the person acquiring an interest from him will take such interest subject only to those executions of which copies have been delivered to the registrar. The effect and meaning of the word "bound" is limited by the concluding words of the section ; but, apart from any limitation implied by these words, the effect of that word should be limited to the extent necessary to arrive at the construction now given to the section. There was no reason why the lands could not, at the time the Territories Real Property Act was in force, have been sold under execution, and a certificate of title issued to the purchaser from the sheriff, without a copy of the execution having been delivered to the registrar under s. 94, provided that the lands had not been dealt with by the execution debtor prior to the registration of the transfer from the sheriff. A copy of an execution with the accompanying memorandum is not an "instrument" within the meaning of s. 41 of the Act, nor is it covered by the definition of that term given in s. 3 (1). Therefore, the priorities of the several execution creditors are not

affected by s. 94, and such priorities are not determined by the order in which the copies are delivered.

*Gibbs v. Messer*, [1891] A. C. 248; Archbold's Q. B. Prac., 14th ed., pp. 804-5; *Holmes v. Tatton*, 24 L. J. Q. B. 346; *Beath v. Anderson*, Hunter's T. T. Cas. 528, referred to.

*Held*, also, affirming the decision of WETMORE, J., that the execution of one Lamont had not expired at the time of the sale by the sheriff, and the latter having in his possession a writ under which he could properly sell the lands, and so selling them, such sale enured to the benefit of all the writs he held in his hands for execution at the time the lands were advertised for sale.

*Held*, also, that the proceeds of the sale of the land should be distributed by the sheriff among the several execution creditors under the provisions of the Creditors' Relief Ordinance. No question was raised before the Judge below as to the effect of that Ordinance, and it was conceded that the respective execution creditors had the right to have the proceeds of sale applied on their executions in the order of their legal priority. But this could not be construed as a consent on the part of the claimants to the fund that it should be disposed of in the same manner as if the Ordinance were not in force, but merely as a contention on the part of the appellants and respondents respectively that the whole fund should be applied on their own executions; and, in the absence of any such consent on the part of the sheriff and all the parties interested in the fund, the provisions of the Ordinance must govern its disposal.

*Held*, as to costs, that the sheriff should deduct his costs from the fund before distribution, and that neither the appellants nor respondents should be entitled to costs below, but the respondents should pay the appellants' costs of this appeal.

*White*, Q.C., for the appellants.

*McLorg*, for the respondents.

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### *In re* GOWER AND JOYNER.

*Constitutional law—Revised Ordinances, N. W. T., c. 36, s. 4—Master and servant—Provision for enforcing payment of wages—Justice of the peace—Fine—Imprisonment—Intra vires.*

The respondent having complained on oath to a justice of the

peace that the appellant owed him money for wages, the ordinary proceedings were taken under s. 4 of c. 86 of the Revised Ordinances, and an order was made by the justice for payment by the appellant of \$6.70 and costs.

On appeal to a Judge the appellant contended that s. 4 of the Ordinance was *ultra vires*; and the Judge referred the question so raised to the Court.

The section is as follows: "It shall be lawful for any justice of the peace, on complaint on oath by any employee or other servant, of ill-usage, non-payment of wages, the same having been first demanded, or improper dismissal by his master or employer, to cause such master or employer to be brought before him, and, upon proof to his satisfaction of the complaint being well founded, to order such complainant to be discharged from his engagement, and to order such master or employer to pay such complainant one month's wages in addition to the amount of wages then actually due him, not exceeding two months' wages as aforesaid, together with the costs of prosecution, the same to be levied by distress and sale of the offender's goods and chattels, and, in default of sufficient distress, to be imprisoned for any term not exceeding one month, unless the said moneys and costs be sooner paid."

The Ordinance in question was passed in 1884 by the North-West Council, and was consolidated in the Revised Ordinances of 1888.

The legislative powers of the North-West Council were determined by the Order-in-Council of the 26th June, 1888, and included power to legislate on "property and civil rights in the Territories;" and by s. 6, "the administration of justice, including the constitution, organization, and maintenance of territorial Courts of civil jurisdiction;" and by s. 7, "the imposition of punishment by fine, penalty, or imprisonment for enforcing any territorial Ordinances."

The Legislative Assembly afterwards replaced the North-West Council; and s. 6 was amended by 54 & 55 V. c. 22, s. 6, s.-s. 10, by adding, "but not including the power of appointing any judicial officers."

It was contended that s. 4 was *ultra vires*, because (1) it imposed a penalty and imprisonment to enforce it, and (2) in giving the jurisdiction therein provided for to a justice of the peace, judicial officers were appointed.

By s. 12 of the North-West Territories Act, 1886, it was provided that "all laws and Ordinances in force in the Territories, and not repealed by or inconsistent with this Act, shall remain in force until it is otherwise ordered by the Parliament of Canada, the Governor-in-Council, or the Lieutenant-Governor-in-Council, under the authority of this Act."

*Held, per* RICHARDSON, J., that the enactment in question related to civil rights between master and servant, and was within the powers of the territorial legislature. Moreover, not having been repealed, and not being inconsistent with anything in the North-West Territories Act, its validity was established.

*Per* WETMORE, J.—The enactment did not attempt to create a crime; it was designed for the object of giving enlarged rights and a more speedy remedy with respect to a civil contract. It was *intra vires* of the legislature by virtue of the power to legislate on "property and civil rights." The section should not be deemed *ultra vires* because it provides that imprisonment may be awarded. There is nothing to prevent the legislature from enacting that a debtor may be arrested on mesne process, or that a judgment debtor may be arrested and imprisoned for non-payment of the amount of the judgment. The imprisonment is for the purpose of enforcing the remedy, not of punishing the party. There is nothing in the powers conferred by the Order-in-Council to exclude the power of appointing judicial officers. The question is not whether the section in question would be *ultra vires* if enacted after the amendment made by 54 & 55 V. c. 22, s. 6, s.-s. 10, but whether it was *ultra vires* in view of the powers conferred by the Order-in-Council. If the section was valid when enacted, it was not rendered invalid because the powers of the legislature *in futuro* were subsequently cut down.

*Per* McGUIRE, J.—The section in question was not enacted for the purpose of creating a crime, and punishing it in the interests of public morality, but for the purpose of providing a cheap, expeditious, and summary mode of enabling servants, *inter alia*, to obtain payment of their wages. The Ordinance does not attempt to create a Court or to appoint judicial or other officers. The legislature found judicial officers already existing and appointed under federal authority, namely, justices of the peace, and it had the right to assign duties to these officers. The section in question was therefore *intra vires*.

*Per* ROULEAU, J., dissenting :—The section in question is not a provision for constituting a tribunal for the purpose of creating a just debt ; it is a penal Ordinance for the enforcement of a contract. It does not come within s. 7 of the Order-in-Council, because it is not for the purpose of enforcing a territorial Ordinance.

SOOTT, J., expressed no opinion.

HAMILTON, Q.C., for the appellant.

SECORD, Q.C., for the respondent.

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[14TH DECEMBER, 1896.]

*In re* McARTHUR'S BAIL.

*Criminal law—Procedure—Bail—Recognizance—Estreat—Notice—Crown Rules—“ Next sitting ” of Court.*

Motion by Wigmore and Walpert, the cognizors in a recognizance, to set aside the proceedings taken for its estreat, and to enforce payment according to its terms.

By the recognizance the cognizors acknowledged that they severally owed Her Majesty \$500, to be made and levied of their goods and chattels, lands and tenements, respectively, to Her Majesty's use, unless one Edward McArthur, who had been charged before a justice of the peace with theft, should personally appear “ at the next sitting of a Court of competent criminal jurisdiction, at the city of Calgary, in and for the Northern Alberta Judicial District, and there surrender himself into custody and plead to such charge.”

It was for the alleged non-fulfilment of this condition to appear that the proceedings to enforce the payment of the indebtedness were taken.

*Held*, that no notice of intention to estreat or to produce McArthur was necessary, and, even if necessary, the giving of such notice would be but a ministerial act, and merely for the convenience of the parties.

*Regina v. Schram*, 2 U. C. R. 91, and *Re Talbot's Bail*, 23 O. R. 65, followed.

*Held*, also, that the Crown Office Rules adopted in England in 1886 had no application, nor had Rule 124 of these Rules, nor anything like it, previously been in force in England.

*Rex v. Clark*, 5 B. & Ald. 728, referred to.

The recognizance was entered into on the 12th October, 1895, and the proceedings were taken for the alleged default of the appearance of McArthur at the sittings at Calgary held on the 5th November, 1895.

It was contended on behalf of the cognizors that, inasmuch as on the 29th October, 1895, two persons, who had previously been committed to gaol for trial at Calgary, were brought before ROULEAU, J., and tried, this was the sitting to which the condition applied, and consequently that the proceedings taken were irregular. The trial of these persons was had under 54 & 55 V. c. 22, s. 12, s.-s. 2, which confers specific powers and duties upon a Judge when any person charged with a criminal offence is committed to gaol for arraignment and trial. It was not shown that it was known on the 12th October, 1895, that there would be a sitting for criminal business on the 29th of that month.

*Held*, that the "next sitting" was the sitting of the 5th November, 1895, which had, under s. 53 of the North-West Territories Act, been previously fixed by the Lieutenant-Governor, and announced to the public.

Application dismissed with costs.

*Hamilton*, Q.C., for the applicants.

*C. C. McCaul*, Q.C., for the Crown.

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*In re* FORBES.

*Advocate—Restoration to roll—Jurisdiction of Court—Payment of costs imposed—Evidence as to misconduct—Time.*

Motion for a rule or order authorizing the reinstatement of Mr. Forbes on the roll of advocates of the North-West Territories.

Mr. Forbes had, for several years prior to the June term, 1896, of the Supreme Court, been an advocate upon the roll, of which the Lieutenant-Governor was the custodian ; but in that

term, upon the application of one Calvert, under s. 16 of Ordinance No. 9 of 1895, respecting the legal profession, an order was made striking his name off the roll, for non-payment of money belonging to Mr. Calvert received by Forbes as his advocate. The order provided that Forbes should pay Calvert's costs of the application.

It was shown that in the interval Mr. Forbes had satisfied the moneys for the non-payment of which that order was made, and affidavits were produced from two gentlemen of the town in which he lived to the effect that his character in the community was good.

It was shown, on the other hand, that the costs of the former application had not been paid.

*Held*, that s. 11 of the Ordinance in question, which confers upon the Court the same powers and jurisdiction over and in respect of advocates as was when the Ordinance was passed possessed by the Supreme Court of Judicature in England over solicitors of that Court, only gives jurisdiction over "such advocates" as, under the preceding sections of the Ordinance, are entered upon the roll, and the only power vested in the Court to interfere with the roll is by ss. 15 and 16, the limit of which is to strike off; and, therefore, as Mr. Forbes' name was not on the roll, the application must be refused.

Even if jurisdiction existed, the application should not be granted, because (1) the costs imposed had not been paid; (2) there was no evidence that the applicant was not in default in respect of other moneys of the same character; and (3) the time which had elapsed since the misconduct was unusually short.

Motion refused without costs.

*Robson*, for the applicant.

*Hamilton*, Q.C., for Calvert.

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[5TH MARCH, 1897.]

*In re* HICKSON AND WILSON.

*Prohibition—Court of Revision—Right to reduce whole assessment without appeal—Judicial powers—Amendment of roll—Resolution of council.*

An appeal by the members of the Court of Revision for the

town of Edmonton from an order of ROULEAU, J., in Chambers, directing the issue of a writ of prohibition to the Court.

The assessor's roll for the town for 1896 was checked over by the assessment committee of the town council, under s. 21 of part IV. of the Municipal Ordinance, and the value of all estates as assessed was increased by twenty per cent. The increase was contrary to the opinion of the assessor, but he did not take the steps provided by s. 30, and so there was no reference to the Court of Revision as provided for by that section. The roll was therefore completed as revised by the committee, and notices of assessment were sent out as provided by s. 24. There were 469 persons, estates, and corporations assessed, and of these about 60, among whom were the applicants for prohibition, appealed to the Court of Revision against their assessments. Some of these appeals were on the ground that the assessments of the appellants were too high; others were on different grounds, and were specially dealt with. On the ground of excess, the Court of Revision reduced the whole assessment valuations twenty per cent., thus affecting not only the assessments of the persons appealing, but those of persons who had not appealed, or whose assessments had not been appealed against by other persons.

By the writ of prohibition granted the members of the Court of Revision were prohibited from further proceeding in confirming or amending the assessment roll as to all assessments that were not appealed or complained against.

The appeal was on the grounds: (1) that the Court of Revision were acting within their powers under s. 30 in reducing the whole assessment; (2) but if not, that prohibition did not lie.

*Held*, that the Court of Revision had not, at the time they affected to do so, any authority to reduce the whole assessment in the manner in which they attempted to do it. When the Act provides a general procedure whereby notice is to be given, and a tribunal to which an appeal may be taken, it would require very clear language to show that the legislature intended in any case to deprive a person of the benefit of that procedure or of that appeal. The legislature intended that the powers conferred by s. 30 should be exercised before the roll is completed as to the amounts assessed and before the notices are sent out, and the Court of Revision had no authority to act under that section, because it was too late to do so.



*Held*, also, that the Court of Revision had no power to act as they did, because they were not required to do so, inasmuch as no statement by the assessor was attached to the roll, as required by s. 30.

*Held*, also, that prohibition lay to the Court of Revision. It was to be assumed that that Court was not acting as a revising board under s. 30 but as a Court, under s. 31 *et seq.*, and the powers conferred by these sections were judicial, and not merely ministerial. The Court, being clothed with judicial functions, was attempting to exercise them in respect of persons who were not before it at all, and was therefore acting without jurisdiction. This Court should not be astute to limit the power of granting prohibition.

*The Queen v. The Local Government Board*, 10 Q. B. D. 821, followed.

It was urged that, inasmuch as, at the time the writ of prohibition was applied for, the Court of Revision had delivered its judgment, the unlawful act was done, and there was nothing to prohibit, so far as that Court was concerned. The affidavit of the clerk of the town, who was also clerk of the Court of Revision, showed that the Court had risen and had not been in session since.

*Held*, however, that the Court still existed, and might be called at any time: s. 33. The duty of altering or amending the roll is that of the Court, not of the assessor, or of the council: s. 36, s.-s. 11; and the affidavits disclosed that this duty had not been completed, but that the clerk was proceeding to amend the roll in accordance with the judgment of the Court. It was to be presumed that he was doing that, not as clerk of the municipality, but as clerk of the Court of Revision: ss. 32 37; and therefore as the officer of the Court.

*Held*, also, that a resolution of the council confirming the decision of the Court of Revision was without authority and amounted to nothing.

Appeal dismissed with costs.

*Beck*, Q.C., for the appellants.

*C. C. McCaul*, Q.C., for the respondents.

[5TH MARCH, 1897.]

## REGINA v. PAH-CAH-PAH-NE-CAPPL

*Criminal law—Murder—Evidence—Admission of prisoner—Indian—Person in authority—Indian agent—Inducement or threat—Burden of proof.*

Crown case reserved.

The prisoner was convicted before Scott, J., and a jury, of the murder of another Indian. The body was found in a house on the Blood reserve, on the Belly river, near Fort Macleod. The only evidence connecting the prisoner with the murder was an admission made by him to a man who at the time was acting as interpreter to the Indian agent on the Blood reserve, to which the prisoner belonged.

After the arrest of the prisoner and while he was in custody he was visited by the Indian agent, and made the following statement through the interpreter: "I killed the policeman, and killed him well. *I also killed a boy up the river*, but I did not shoot the policeman at Lee's creek. Those who accuse me of that crime lie about me. What I have done I do not deny, I do not hide. I do not like people to accuse me of crimes I did not commit." The italicized words were supposed to refer to the Indian with whose murder the prisoner was charged. The murdered man was about twenty-five years old, the prisoner was a much older man; and the only evidence which indicated that the murdered man was referred to was the fact that the body was found where it was; the testimony of the interpreter that Indians of the prisoner's tribe were from superstitious notions not in the habit of mentioning the names of deceased personal acquaintances, if avoidable, and that middle-aged and elderly Indians were in the habit of speaking of any young man whom they had known from boyhood as a boy; and the fact that the prisoner and the interpreter both resided on a point on the Belly river below the scene of the death.

The interpreter swore that neither during the conversation nor at any time before did he, to his knowledge, nor did any one else, make any threat or hold out any inducement to the prisoner to procure him to make a statement in regard to the killing. On cross-examination he said: "I do not remember the opening of the conversation. I did not ask him about the shooting. I do

not remember telling him he need not be afraid, as we were not policemen. As far as I can remember, any statement he made was entirely voluntary." He also said that he thought it was because the prisoner was in a boasting mood that he made the statement, and he would say that Indians were not in the habit of boasting of acts which they never committed. After this evidence had been given, evidence of the prisoner's statement, as above set out, was admitted and given by the interpreter, against the objection of counsel for the prisoner. After giving evidence of the statement, the interpreter testified as follows: "I was rather surprised when he started on the subject of his crimes; they had no connection with the previous subjects. If the Indian agent had said anything to induce him to speak about his crimes, I should have remembered it. I do not remember whether he stated why he had killed the Indian, but I would not swear that he did not make any statement as to his motives." The Indian agent was afterwards called by the Crown and testified as follows: "I am instructed to act as legal adviser to Indians under my jurisdiction. As a rule I always tell them that I am here as their adviser to help them. . . . I am not prepared to say I did not hold out any threats or inducements to get the prisoner to make a statement. I am not prepared to contradict the interpreter when he says that no threat was made or inducement held out, and the prisoner's statement as to killing was a voluntary one." On cross-examination he said: "I as a rule always look after the defence of Indians of my reserve who are charged with offences. They all understand that I do that. They have been repeatedly told so. When necessary to retain advocates to conduct such defences, I have always assisted them in the defence and in procuring evidence. I always interview the accused before the trial, if possible. I make a rule to tell Indians so charged that what they tell is to their benefit to assist in their defence. I do not remember whether I told prisoner that at the time of the interview. I procured that interview for the purpose of assisting him in his defence."

The trial Judge reserved three questions:

(1) Whether the admission was properly received in evidence.

(2) If properly received, whether, from what subsequently appeared, it should have been struck out.

(8) Whether the evidence was sufficient to support the conviction.

*Held*, that the evidence should have been struck out. An admission of guilt made by a person charged with an offence, to a person in authority, under the inducement of a promise of favour, or by menaces, or under terror, is inadmissible. The Indian agent was, quoad the Indians on his reserve, a person in authority; he is appointed by the Governor-General to carry out the Indian Act and the Orders-in-Council made under it, and is *ex officio* a justice of the peace. A confession made to such an agent, under the inducement of a promise or of a threat or menace, is not admissible. The inducement may be of a very slight character. In this case no positive evidence that an inducement was offered was given; but the burden of proving that the admission was not made under an inducement or threat is on the Crown; and, in view of the testimony given by the Indian agent, it was not proved satisfactorily by the testimony of the interpreter that the confession was free and voluntary. The interpreter swearing that he did not remember this and did not recollect that was not sufficient.

*Regina v. Fennell*, 7 Q. B. D. 147, and *Regina v. Thompson*, [1898] 2 Q. B. 12, followed.

As, without this admission, there was no evidence to connect the prisoner with the murder, the conviction must be quashed.

*Rimmer*, for the prisoner.

*T. C. Johnstone*, for the Crown.

[8TH JUNE, 1897.]

### MORTON v. BANK OF MONTREAL.

*Security for costs—Appeal to Court in banc—Extension of time—“Special circumstances.”*

On the 31st March, 1897, the plaintiff served notice of appeal to the Court in banc from the judgment of the trial Judge, but took no further steps until the 7th May, 1897, when, on an affidavit explaining that owing to poverty he had been unable until that day to procure sufficient means to cover the necessary disbursements for printing the appeal case, he obtained

an *ex parte* order extending the time for filing it. On the 8th May, 1897, the defendants issued a summons for an order extending the period of fifteen days after service of notice of appeal prescribed by s. 504, C. J. O., in which to apply for security for costs of appeal, and also for an order for security for costs of appeal.

The motion was founded upon an affidavit filed on behalf of the plaintiff disclosing his poverty, and an affidavit showing that on the 15th April, 1897, an execution for costs taxed to the defendants in this action had been placed in the hands of the sheriff, whose only return to the writ, if called for, would be *nulla bona*.

The Judge in Chambers referred to the Supreme Court in banc the questions: (1) whether the extension of time for applying for security for costs should be granted; and (2) whether security for costs of appeal should be ordered.

*Held*, that, as the defendants' delay in applying had not prejudiced the plaintiff's position, the extension of time asked for should be granted.

2. That the plaintiff's poverty and inability to pay costs constituted "special circumstances" as mentioned in s. 504, C. J. O., and that security for costs should be ordered.

*Re Ivory*, 10 Ch. D. 372; *Farrer v. Lacy*, 28 Ch. D. 482; *Harlock v. Ashberry*, 19 Ch. D. 84; and *Donnelly v. Ames*, 17 P. R. 106, referred to.

Order made that the plaintiff pay into Court \$100 as security for the defendants' costs of appeal. Costs of application and reference to be costs to the successful party in the appeal.

*Ford Jones*, for the defendants.

*Secord*, Q.C., for the plaintiff.

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[11TH JUNE, 1897.]

### *In re* CALGARY GAS AND WATERWORKS CO.

*Assessment and taxes—Mains and pipes—Streets.*

An appeal by the corporation of the city of Calgary from the judgment of ROULEAU, J., 16 Occ. N. 235.

The company was assessed for 1896 on "lots 26 to 32. Value of lot or parcel without improvements, \$315. Value of buildings and other improvements, \$100,000." In this latter sum was included the value of the mains and pipes under the streets and lanes of the city.

The Court of Revision having sustained the assessment, the company appealed to a Judge of the Supreme Court. This appeal was argued before ROULEAU, J., who held that the mains and pipes were not assessable as land at all; and that in any event they would be exempt from taxation as forming part of the public streets—the property of the city. He accordingly reduced the assessment to \$5,785, the value of the lots and pumping station, etc., actually on the lots.

The appeal was argued in December, 1896.

*C. C. McCaul*, Q.C., for the appellants.

*James Muir*, Q.C., and *P. McCarthy*, Q.C., for the respondents.

On the 11th June, 1897, the judgment of the Court was delivered by

WETMORE, J.—In view of s. 7 of the Ordinance incorporating the company, No. 23 of 1889, and ss. 30 and 94 of the Companies' Ordinance therein referred to, this Court is, in my opinion, bound by the recent decision of the Supreme Court of Canada in *Consumers' Gas Company of Toronto v. City of Toronto*, not yet reported, and must hold that the respondents' mains and pipes which are within the city of Calgary are assessable as land, unless effect is to be given to some of the respondents' contentions hereinafter mentioned.

Sections 30 and 94 respectively of the Companies' Ordinance are substantially to the same effect as ss. 1 and 13 of the Act incorporating the Consumers' Gas Company of Toronto, 11 V. c. 14, cited by Mr. Justice Gwynne in his judgment in *Consumers' Gas Company of Toronto v. City of Toronto*. It was urged, however, on behalf of the company that, for the purposes of assessment, s. 31 of the Ordinance incorporating the city of Calgary, No. 33 of 1893, defined the meaning of "land," "real property," and "real estate," completely, and that those words for such purposes only embraced what that section specified, and *Wood v. McAlpine*, 1 A. R. 284, was relied on for such contention.

I do not dissent from that case, but I think that the clear indication of the legislature in the Ordinance rendered that case inapplicable. In the first place, the section provides that those terms "shall *include* all buildings" and the other things specified; it does not provide that they shall not include what they ordinarily mean, and to hold that they do not include what they ordinarily mean would involve an absurdity, because in that case "land," in its ordinary sense, could not be assessed as such: only the buildings and other things erected upon or affixed to the land, and machinery and other things affixed to a building, as specified in the section, and mines, minerals, and quarries, could be assessed as land; the soil and the herbage, the piece or plot of land itself, could not be assessed as land, and, if assessable, could only be assessed as personal property under s. 32.

Every section of the Ordinance bearing on the question indicates that the legislature never contemplated that. It is unnecessary to decide, therefore, whether the definition of these words as given in s. 177 of the Ordinance is to be applied to these words when used for the purpose of assessment. The term "land," in itself, includes the soil.

It was further urged that no property of the company was assessable in Calgary, because the city had taken the power to tax the shares in the company, and therefore they cannot tax the corpus; it would be a double taxation. However objectionable that might be under the Constitution of the United States, it affords no objection under the laws in force in the Territories. In *Ex p. McLeod*, 1 Pugs. 226, the applicant was assessed in the parish of Richibucto on his personal estate; he was also liable to be assessed in the city of St. John under the St. John Assessment Act, on "all his personal property, wherever the same may be," and he was assessed on such property in St. John. The Court sustained the assessment in Richibucto. That was a double taxation in every sense of the word. RITCHIE, C.J., in delivering the judgment of the Court, quotes Lord Cairns in *Partington v. Attorney-General*, L. R. 4 H. L. 122, as follows: "As I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the tax within the letter of the law, the subject is free,

however apparently within the spirit of the law the case otherwise appears to be."

Section 36 of the Ordinance enacts that "*all* land, personal property, and income in the city shall be liable to taxation." In view of what I have held, this property in question is land, and, therefore, embraced by the language of the Ordinance which I have just quoted.

It was also objected that the mains and pipes were not liable to taxation because of the agreement put in whereby it is alleged the city gave the company, for a consideration, the right to put in such mains and pipes. I must say that I am unable to appreciate this contention. If it means anything, it must mean this, that because the city, having the authority to do so, has for a consideration allowed the company to appropriate a portion of its property, the company cannot be taxed. If that is correct, if the city, for a money consideration paid, sold a portion of its property, say an acre of its land, to a private citizen, such property would be exempt from taxation, because the city was paid for the land. I think it is quite sufficient to say that the Ordinance does not provide that such property shall be exempt from taxation, and the whole purpose of the Ordinance is that the property of all the citizens within the city, no matter how acquired, unless exempted as the Ordinance prescribes, shall be assessable for the purpose of maintaining the objects for which the incorporation was obtained. I am of opinion, therefore, that, so far as this branch of the appeal is concerned, the respondents' mains and pipes within the city of Calgary are assessable as land.

This, however, does not dispose of this appeal, because very serious questions are raised with respect to the form of the assessment and the powers of the Court to amend it.

If these mains and pipes are fixtures to the lots assessed, within the meaning of s. 31 of the Ordinance incorporating the city, no amendment is necessary; the assessment is proper in form. If fixtures, they ought to be assessed as such in connection with the lots. But I cannot bring my mind to the conclusion that seven or eight miles of pipes extending from these lots, and ramifying all over the city and beyond it, are fixtures to such lots, as I have understood the term.



I can find no authority for holding that they are fixtures, except that of Boyd, C., in *Consumers' Gas Company v. City of Toronto*, 26 O. R. at pp. 726 and 727, and in that respect I must respectfully differ from that judgment. *The Queen v. Lee*, L. R. 1 Q. B. 241, does not decide that they are fixtures to the land or building where the pumping or generating works are situated. The mains and pipes were not mentioned in that case. The cases generally seem to point in the direction that such pipes and mains ought, in case they are situate in different wards or parishes, making separate and distinct assessments, to be proportionately assessed in the different wards or parishes. See *Consumers' Gas Company v. City of Toronto*, 26 O. R. at p. 731, and the judgments in the Supreme Court of Canada in that case, already referred to. This seems to me to be altogether inconsistent with their being fixtures to the land or building where the pumping or generating works are.

The pipes and mains, being, as decided in the last mentioned judgment, land, the form of assessment is not correct. In fact the respondents have not, on the face of the roll or of the notice served on them, been assessed at all in respect of such mains and pipes. They have merely been assessed in respect to lots 26 to 32 in block 11, and the buildings and improvements on such lots. Although, no doubt, the intention was to assess them in respect of the mains and pipes, as a matter of fact the city has not in form so assessed them, and, as the roll stands at present, no assessment in respect of mains and pipes can be enforced. It is claimed, however, that this Court can so amend the assessment and the roll as to place these mains and pipes and the assessable values of them in due form on the roll. Conceding, for the purposes of this branch of the case, that the Court of Revision, under the power conferred by s. 40 to *alter* the assessment and amend the roll accordingly, had such powers of amendment, and that the Judge under s. 41 had similar powers, and that this Court can exercise the same powers, I think this Court is not in a position to make such amendment, as it has nothing to make it by, and it might be an injustice to the respondents to do so. The respondents were served with a notice of assessment informing them that they were assessed \$100,815 in respect of the value of lots 26 to 32 in block 11, and of the value of the buildings and improvements *thereon*. They appealed to the Court of Revision from such assessment,

on the ground that too great a value was placed on these lots, buildings, and improvements. The burden of showing that was cast on them; they were not called upon to show the value of something else in respect of which, so far as the face of the notice of assessment and the roll went, they were not assessed at all. If the respondents had been notified in the notice of assessment that they were assessed \$94,100 in respect of their mains and pipes, they might have been in a position to show by evidence that they were over-assessed in that respect, and carried an appeal forward on such assessment.

The respondents, therefore, not being called upon to do anything but prove that the lots specified and the buildings and improvements thereon were over-assessed, did not come prepared to prove anything else, and, the mains and pipes not having on the face of the record been assessed, the principle of *omnia acta rite* will not apply in favour of the city. Mr. Alexander proved all that it was necessary to prove for the purposes of the respondents' appeal, and the city can take no advantage because he failed to prove the value of mains and pipes.

If the city wished to amend by placing the mains and pipes and their value on the roll, it was incumbent on them to give evidence of the value, so as to enable the amendment to be made, and the respondents should have been in a position to answer such evidence and show the true assessable value of such mains and pipes, if such evidence was erroneous. If we should amend now, as desired, without any evidence to show the value, we should be doing what is practically against the principle of every assessment law, that is, we should assess these respondents with respect to the value of these mains and pipes, without giving them an opportunity to be heard with respect to such value.

On this ground, therefore, I am of opinion that this appeal should be dismissed and the judgment of my brother Rouleau affirmed.

I think the appellants ought to pay the costs of this appeal; but, as the appellants were successful as to the substantial question argued, namely, the right to assess the mains and pipes within the city, and, as the discussion of that question took up nearly the whole of the time occupied in hearing the appeal, I think the fee allowed the respondents should be comparatively small, \$20.

## NORTHERN ALBERTA JUDICIAL DISTRICT.

[ROULEAU, J., 19TH MARCH, 1897.]

### EASTMAN v. RICHARD.

*Landlord and tenant—Agreement for lease—Possession—Overholding—Terms of tenancy—Notice—Termination.*

The plaintiff sued the defendants for \$66.66, being two months' rent of certain premises, at the rate of \$400 per year, the months being May and June, 1896.

The following letter was written on the 16th July, 1894, by the defendants to the plaintiff's agent, and accepted by him :

“ We are prepared to rent that store where the *Herald* offices used to be, and will give you \$400 a year for the whole of the ground floor, as well as the cellar. We will rent for eleven months from the 1st August next at the rate of \$400 per year.”

The defendants took possession of the premises in pursuance of the terms of this letter, and held for eleven months, after the expiration of which no new agreement was entered into, but the defendants continued in possession until the 30th April, 1896, when they moved out, having, on the 9th March, 1896, given notice to the plaintiff that they would vacate the premises on the 30th April. Rent was paid by the defendants up to the date of the removal at the rate of \$400 a year. During the time the defendants were in occupation of the premises, they paid rent to the plaintiff monthly or bi-monthly, just as demanded. On the 30th April, 1896, the defendants tendered the key of the premises to the plaintiff's agent, who refused to accept it.

The questions for the Court were, whether the defendants were monthly or yearly tenants, and whether the notice given was sufficient to determine the tenancy.

*Held*, that where a longer or shorter notice is not expressly stipulated for, a yearly tenancy may generally be determined by six months' notice, a quarterly tenancy by three months' notice, a monthly tenancy by one month's notice, and a weekly tenancy by one week's notice. If the tenancy was according to the first

part of the letter, "we are prepared to rent that store, etc., and will give \$400 a year," etc., it would be a yearly tenancy; but the nature of the tenancy was clearly indicated by the following sentence, "we will rent for eleven months from the 1st August next at the rate of \$400 per year." This constituted the real tenancy; and, if the defendants had surrendered the store at the end of the eleven months, the plaintiff would not have been entitled to any notice. But they continued in occupation as overholding tenants. When a tenant is allowed to hold after the expiration of the tenancy, the terms on which he continues to occupy are matter of evidence rather than of law. If there is nothing to show a different understanding, he will be considered to hold on the former terms. There being nothing to show that the defendants were holding on different terms, and the original tenancy not being a yearly tenancy, the defendants must be regarded as monthly tenants, and the plaintiff had sufficient notice to put an end to the tenancy.

*Mayor of Thetford v. Tyler*, 8 Q. B. 95; *Doe d. King v. Grajton*, 18 A. & E. 495; and *Atherstone v. Bostock*, 2 M. & G. 518, specially referred to.

Action dismissed with costs.

*P. McCarthy*, Q.C., for the plaintiff.

*Lougheed and McCarter*, for the defendants.

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[31ST MARCH, 1897.]

### VAN WART v. CRITCHLEY.

*Partnership—Payment of firm debt to one partner—Acceptance of goods for money.*

Action to recover a balance of a debt claimed by the plaintiff as assignee of the firm of Van Wart and Livingstone, which consisted of himself and Livingstone.

The defendant alleged that the whole of the account was fully paid and satisfied by the payment of \$10 and the delivery of 180 lbs. of beef to Livingstone, the same being expressly accepted in full discharge and satisfaction of the debt.

The evidence was that Livingstone presented the account to the defendant, who gave him his cheque for \$10, and bargained

to give beef for the balance. The plaintiff got the cheque from Livingstone, and credited the defendant with the amount. Livingstone received the beef according to agreement, but never told the plaintiff of it, nor gave credit to the defendant for it.

*Held*, that if a debt is owing to a firm, payment by the debtor to any one partner extinguishes the claim of all, each partner being ostensibly the agent of all the rest to get in debts owing to the firm. So that, when it is said that payment to one partner is payment to all, it is supposed that the payment is made in discharge of a debt due to the firm. It follows that a partner can effectually release and give a valid receipt for such debt, unless it be shown that he acted in fraud of his partners and in collusion with the debtor. In this case it could not be contended that the defendant was in collusion with Livingstone to defraud the plaintiff. A debtor can pay a partnership debt to one of the partners by an equivalent for cash, unless it can be shown that the debtor is in collusion with the partner.

*Nieman v. Nieman*, 43 Ch. D. 205, discussed.

Action dismissed with costs.

*P. McCarthy*, Q.C., for the plaintiff.

*C. C. McCaul*, Q.C., for the defendant.

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[SCOTT, J., 26TH FEBRUARY, 1897.]

*In re* KETTLESON.

*Land Titles Act—Transfer—Form J.—Effect of—Estate—Execution of transfer by corporation—Seal—Signature of officers—Affidavit of execution.*

A. K. applied to the registrar to bring certain lands under the Land Titles Act, and for the issue to him of a certificate of ownership. A. K. claimed title under an instrument of transfer in the form prescribed by s. 61 of the Act, Form J., from the Corporation des Révérends Pères Oblats, the patentees, purporting to be signed by the president and procurator of the corporation, with the corporate seal attached, verified by an affidavit of execution.

The Registrar referred to a Judge the determination of the following questions :—

(1) Whether an instrument in Form J. is effectual to convey the fee simple in lands not under the operation of the Act.

(2) Whether the affidavit of execution showed that the instrument was duly executed by the corporation.

The registrar appeared in person.

*H. W. H. Knott*, for the applicant.

SCOTT, J.—The affidavit of execution indorsed upon the document shows that the persons signing it were the president and procurator respectively of the corporation. It is not shown that those officers were authorized to attach the corporate seal, but, in my view, it is unnecessary to show this. The president of a corporation is usually the one who signs documents under the corporate seal, and where, as in the present case, he is shown to have so signed, I think the registrar should treat the document as having been executed by the patentee corporation.

It may be open to question whether, under s. 100, the registrar should not accept a document under the seal of a corporation, even where it does not bear the signature of any of its officers, but it is unnecessary for me to decide the question.

I am also of opinion that the form of the document is sufficient to pass the title to the transferee. Being under seal, it is a deed, and it is a deed which indicates, in the plainest possible manner, the intention of the transferors' corporation to convey all its title to the lands to the transferee. The rule is that deeds shall be construed favourably, and as near the apparent intention of the parties as possible, consistent with the rules of law, and I know of no rule of law which would prevent effect being given to the document in accordance with its expressed intent.

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## Supreme Court of Canada.

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P. C. REFERENCE.]

[1ST MAY, 1897.]

### *In re* BIGAMY SECTIONS OF CRIMINAL CODE, 1892.

*Constitutional law—Criminal Code, ss. 275, 276—Bigamy—Canadian subject marrying abroad—Jurisdiction of Parliament.*

*Held*, STRONG, C.J., dissenting, that ss. 275 and 276 of the Criminal Code, 1892, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada.

*Macleod v. Attorney-General for New South Wales*, [1891] A. C. 445, distinguished.

*Newcombe*, Q.C., for the Crown.

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EXCHEQUER COURT.]

### REGINA v. CANADA SUGAR REFINING CO.

*Revenue—Customs duties—Importation of goods—Time of importation—Tariff Act—Construction—Retrospective legislation—R. S. C. c. 32—57 & 58 V. c. 33—58 & 59 V. c. 23.*

By s. 4 of the Customs Tariff Act, 1894, 57 & 58 V. c. 33, duties shall be levied on certain specified goods "when such goods are imported into Canada." By s. 150 of the Customs Act, R. S. C. c. 32, the importation of goods "shall be deemed to have been completed from the time the vessel in which such goods were imported came within the limits of the port at which they ought to be reported," and by s. 25 the master of a vessel entering any port of Canada must report in writing to the collector or proper officer the particulars of his ship and cargo and the portion to be landed at that port, etc.; s. 31 provides that duties shall not be collected at a port where goods are entered but not landed.

*Held*, that the importation under s. 150 is not completed at the first port of entry of the vessel, if the goods are not landed

there, but only at her arrival at her port of final destination. Therefore, when a vessel containing sugar entered North Sydney in April, 1885, and reported under s. 25, and then proceeded to Montreal, where she arrived on the 4th May, and landed her cargo, the sugar was liable to duty under an Act which came into force on the 8rd May.

*Held*, further, that the duties attached notwithstanding that such Act did not receive the royal assent until July, 1895, it containing a provision that it should be held to have come into force on the 8rd May.

*Fitzpatrick*, Q.C., S.-G., and *Newcombe*, Q.C., for the appellant.

*Osler*, Q.C., and *Gormully*, Q.C., for the respondent.

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ONTARIO.]

JAMIESON v. LONDON AND CANADIAN LOAN AND  
AGENCY COMPANY.

*Landlord and Tenant—Lease—Mortgage of lease—Assignee of term—Assignment or sub-lease.*

A lease of real estate for twenty-one years, with a covenant for a like term or terms, was mortgaged by the lessee. The mortgage, after reciting the terms of the lease, proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description, and "all and singular the engines and boilers which now are or shall at any time hereinafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged, or intended so to be, and form part of the term hereby granted and mortgaged." The habendum of the mortgage was "to have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired for the term of years created by the said lease, less one day thereof, and all renewal," etc.

*Held*, reversing the judgment of the Court of Appeal, 16 Occ. N. 285, 28 A. R. 602, that the premises of the mortgage contained an express assignment of the whole term, and the habendum, if intended to reserve a portion to the mortgagor,



was repugnant to the premises, and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property, but referring to the recital describing the lease as one for a term of twenty-one years.

*Held*, further, that the habendum did not reserve a reversion to the mortgagor; that the reversion of a day generally, without stating it to be the last day of the term, is insufficient to give the instrument the character of a sub-lease.

*E. D. Armour*, Q.C., and *W. H. Irving*, for the appellant.

*Arnoldi*, Q.C., for the respondents.

## CONSUMERS' GAS CO. OF TORONTO v. CITY OF TORONTO.

*Assessment and taxes—Toronto Gas Company—Mains and pipes—Exemptions—Real property—Chattels—Fixtures—Highways—Title to portion of highway—Legislative grant of soil in highway—11 V. c. 14—55 V. c. 48—Ontario Assessment Act, 1892.*

Gas pipes laid under the streets of a city which are the property of a private corporation are real estate within the meaning of the Ontario Assessment Act, 1892, and liable to assessment as such, as they do not fall within the exemptions mentioned in s. 6 of the Act.

The appellants were incorporated by an Act of the late Parliament of Canada, 11 V. c. 14, by the first clause of which power was conferred "to purchase, take, and hold lands, tenements, and other real property for the purposes of the said company, and for the erection and construction and convenient use of the gas works" of the company; and further power was conferred by the thirteenth clause, "to break, dig, and trench so much and so many of the streets, squares, and public places of the said city of Toronto as may at any time be necessary for the laying down the mains and pipes to conduct the gas from the works of the said company to the consumers thereof, or for taking up, renewing, altering, or repairing the same when the said company shall deem it expedient.

*Held*, that these enactments operated as a legislative grant to the company of so much of the land of the streets, squares,

and public places of the city and below the surface as it might be found necessary to take and hold for the purposes of the company, and for the convenient use of the gas works ; and when openings were made at the places designated by the city surveyor, as provided in the charter, and they were placed there, the soil they occupied was land taken and held by the company under the provisions of the Act of incorporation ; and the proper method of assessment of the pipes so laid and fixed in the soil of the streets and public places in a city ought to be as in the case of real estate and land generally and separately in the respective wards of the city in which they may be actually laid.

Judgment of the Court below, 28 A. R. 551, 16 Occ. N. 282, affirmed.

*McCarthy*, Q.C., and *W. N. Miller*, Q.C., for the appellants.

*Robinson*, Q.C., and *Fullerton*, Q.C., for the respondents.

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### MAY v. LOGIE.

*Will—Sheriff's deed—Evidence—Proof of heirship—Rejection of evidence—New trial—Puppet-plaintiff—Champerty—Maintenance.*

A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator, and through conveyances from them to persons abroad. The Courts below held that the will was valid : 27 O. R. 501 ; 23 A. R. 785 ; 16 Occ. N. 196, 378.

*Held*, affirming such decisions, that, as the evidence of the relationship of the alleged grantors to the deceased was only hearsay, and the best evidence had not been adduced ; as the heirship at law was dependent upon the alleged heir having survived his father, and it was not established and the Court would not presume that his father died before him ; as the persons claiming under the will had no information as to the identity of the parties in interest, who were represented in the transaction by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust ; and as there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will ;

the latter had failed to establish the title of the persons under whom they claimed, and the appeal should be dismissed.

*J. A. Donovan*, for the appellant.

*Shepley*, Q.C., for the respondent.

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## ROGERS v. TORONTO PUBLIC SCHOOL BOARD.

*Negligence—Unsafe premises—Risk voluntarily incurred.*

An employee of a company which had contracted to deliver coal to the defendants went voluntarily to inspect the place where the coal was to be put, on the evening preceding the day of the proposed delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal bins. He did not apply to the defendants or the caretaker in charge of the premises before making his visit.

*Held*, that in thus voluntarily visiting the premises for his own purposes and without notice to the occupants, he assumed all risks of danger from the condition of the premises, and could not recover damages.

Judgment of the Court below, 23 A. R. 597, 16 Occ. N. 283, affirmed.

*McCarthy*, Q.C., for the appellant.

*Robinson*, Q.C., and *F. E. Hodgins*, for the respondents.

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## BROUGHTON v. TOWNSHIPS OF GREY AND ELMA.

*Municipal corporations—Drainage by-laws—Initiating and contributing townships.*

Where the council of a municipality assumed to pass a by-law under s. 585 of the Consolidated Municipal Act of Ontario, 55 V. c. 42, for the construction, maintenance, and repair of drainage works, and thereby to charge and assess lands in an adjoining municipality for benefit as for outlet, in order to raise the funds necessary to meet the cost of such works:—

*Held*, reversing the judgment of the Court of Appeal for Ontario, 23 A. R. 601, 16 Occ. N. 281, and of a Divisional Court, 26 O. R. 694, 15 Occ. N. 292, that, as the drain only

emptied into a natural stream extending into the adjoining municipality, the lands in such adjoining municipality purported to be affected by such by-law were not assessable for a liability thereunder to contribute towards the cost of the works, and so far as they were concerned the by-law was *ultra vires* of the initiating municipal corporation; and that a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have the adjoining municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law.

*J. P. Mabee*, for the appellant.

*Garrow*, Q.C., for the respondents Grey.

*G. G. McPherson*, for the respondents Elma.

QUEBEC.]

[7TH JUNE, 1897.

### GAUTHIER v. MASSON.

*Possessory action—"Possession annale"—Uninclosed vacant lands—Boundary marks—Delivery of possession.*

In 1890 G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him, on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and uninclosed up to the time of the disturbance, and was assessed as a 25-foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and uninclosed, was sold to another person, who commenced laying foundations for a building, and in doing so encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance.

*Held*, that the *possession annale*, required by Art. 946, C. C. P., was sufficiently established to entitle the plaintiff to maintain his action.

Judgment of the Court below reversed.

*Belcourt*, for the appellant.

*Madore and Merrill*, for the respondents.

## ROBERTSON v. DAVIS.

*Promissory note—Qualified indorsement—Suretyship.*

D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words “not negotiable and given as security.” The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide books, which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment, and, A. having died, R., as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R., and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm.

*Held*, that the action was not based upon the real contract between the parties, and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes.

*Held*, further, *per* GIROUARD, J., that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself.

Judgment of the Court below affirmed.

*Greenshields*, Q.C., and *Lafleur*, for the appellant.

*Macmaster*, Q.C., for the respondent.

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McGOEY v. LEAMY.

*Contract—Boundaries—Referee's decision—Bornage—Arbitrations.*

The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascertain and fix the true division line upon the ground, and agreeing further to abide by his decision

and accept the line which he might establish as correct. On the conclusion of the referee's operations, one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary and to revendicate the strip of land lying upon his side of it.

*Held*, reversing the judgment of the Court of Queen's Bench, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed, and was not subject to the formalities prescribed by the Code of Civil Procedure relating to *bornage* or arbitrations.

*Foran*, Q.C., for the appellant.

*Geoffrion*, Q.C., and *Champagne*, for the respondent.

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### TURCOTTE v. DANSEREAU.

*Judgment—Writ of summons—Service of—Judgment by default—Opposition to judgment—Reasons of—"Rescisoire" joined with "rescindant"—False return of service.*

No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.

The provisions of Arts. 488 *et seq.*, C. C. P., relate only to cases where a defendant is legally in default to appear or to plead, and have no application to an *ex parte* judgment rendered for default of appearance, in an action the writ of summons in which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment and have it set aside, notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.

An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the writ, which also alleges the defendant's grounds of defence

upon the merits, should not be dismissed merely for the reason that the rescissoire has thus been improperly joined with the rescindant.

Judgment of the Court below reversed.

*Languedoc*, Q.C., for the appellant.

*Lajoie*, for the respondent.

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### VALADE v. LALONDE.

*Deed—Gift of land in contemplation of death—Presumption of nullity—Validating circumstances—Dation en paiement—Arts. 762, 989, C. C.*

During her last illness and a short time before her death, B. granted lands to V. by an instrument purporting to be a deed of sale, for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee, and the consideration acknowledged by the deed was never paid.

*Held*, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of Art. 762, C. C., because the circumstances tended to show that the transaction was actually for good consideration, and consequently legal and valid.

*Geoffrion*, Q.C., and *Beaudin*, Q.C., for the appellant.

*Madore*, for the respondents.

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### CHARLEBOIS v. SURVEYER.

*Malicious prosecution—Reasonable or probable cause—Evidence—Damages.*

S., being a holder of a promissory note indorsed to him by the payees, sued to recover the amount, but his action was dismissed upon evidence that the note had never been signed by the person whose name appeared as maker, nor with his knowledge or consent, but had been signed by his son without his authority. The son's evidence was to the effect that he never intended to sign the note, and if he had actually signed it with his father's name, it was because he believed that it was merely a receipt for goods delivered by express. Immediately after the

dismissal of the suit, S. wrote to the payees asking them if they would give him any information which would help him in laying a criminal charge in order to force payment of the note and costs. He also applied to the express company's agent, by whom the goods were delivered and the note procured, and was informed that there was a receipt for the goods, but that the signature was denied, and could not be proved. However, without further inquiry, and notwithstanding the warning of a mutual friend against taking criminal proceedings, S. laid an information against the son for forgery. The police magistrate at Montreal, upon the investigation of the charge, declared it to be unfounded and discharged the prisoner.

*Held*, reversing the judgment of both Courts below, that, under the circumstances, the prosecution was without reasonable or probable cause, and the plaintiff was entitled to substantial damages.

*Saint-Pierre*, Q.C., for the appellant.

*Geoffrion*, Q.C., and *Beaudin*, Q.C., for the respondent.

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### GUERTIN v. GOSSELIN.

*Collocation and distribution—Appeal against—Art. 761, C. C. P.—Hypothecary claims—Assignment—Notice—Registration—Prête-nom—Action to annul deed—Parties in interest—Incidental proceedings.*

The appeal from judgments of distribution under Art. 761, C. C. P., is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.

The provision of Art. 144, C. C. P., that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench.

The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties.



Appeal allowed with costs and case remitted for hearing on the merits.

*Beique*, Q.C., and *Lafontaine*, Q.C., for the appellant.

*Geoffrion*, Q.C., and *Paradis*, for the respondent.

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### DAVIS v. CITY OF MONTREAL.

*Municipal corporations — Appointment of officers — Summary dismissal — Statutes — Interpretation of — Difference in text of English and French versions — 52 V. c. 79, s. 79 (Q.) — “ A discrétion ” — “ At pleasure. ”*

The charter of the city of Montreal, 1889, 52 V. c. 79, s. 79, gives power to the city council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised “ a sa discrétion,” while the English version has the words “ at its pleasure.”

*Held*, that, notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and that the city council was thereby given full and unlimited power, in cases where the engagement had been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment of only the amount of salary accrued to such officer up to the date of such dismissal.

Judgment of the Court below affirmed.

*Madore*, for the appellant.

*Ethier*, Q.C., for the respondent.

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### DEMERS v. MONTREAL STEAM LAUNDRY CO.

*Appeal — Questions of fact — Second appellate court.*

Where a judgment upon questions of fact rendered in a Court of first instance has been reversed upon a first appeal, a second court of appeal should not interfere to restore the original judgment, unless it clearly appears that the reversal was erroneous.

Judgment of the Court below affirmed.

*Geoffrion*, Q.C., and *Goyette*, for the appellant.

*McGibbon*, Q.C., for the respondent.

## GUERTIN v. SANSTERRE.

*Building societies—Participating borrowers—Shareholders—C. S. L. C. c. 69—42 & 43 V. c. 32—Liquidation—Expiration of classes—Assessments on loans—Notice of—Interest and bonus—Usury laws—C. S. C. c. 58—Art. 1785, C. C.—Administrators and trustees—Sales to—Pretenom—Art. 1484, C. C.*

S. applied to a building society for a loan of \$3,500, which was subsequently advanced to him upon signing a deed of obligation and hypothec, submitting to the conditions and rules applicable to the society's method of carrying on their lending business, and declaring that he had become a subscriber for shares in the company's stock for an amount corresponding to the amount of the loan, namely, seventy shares of the nominal value of \$50 each in a class to expire after seventy-two monthly payments, or in six years from the date of its commencement. July, 1878, this term corresponding with the term fixed for the repayment of the loan. He thereby also agreed to make monthly payments of one per cent. each upon the stock, and that the loan should be repaid at the expiration of the class, when, upon the liquidation of the business of that class, members would be entitled to the allotment of their shares subscribed as paid up, partly by the monthly instalments and partly by accumulated profits to be derived from whatever moneys had been paid in and invested for the benefit of that class, at which time, whatever he might be so entitled to receive in shares of stock should be credited toward the reimbursement of the loan. He further obliged himself to pay, as interest and bonus, the additional sum of one per cent. upon the loan by similar monthly instalments during the time it remained unpaid. S. paid all the instalments by semi-annual payments of \$420 each until 1st May, 1884, making a total of seventy monthly instalments of \$70 each, leaving two more instalments of each kind still to become due before the date originally fixed for the termination of his class. The society went into liquidation under the provisions of 42 & 43 V. c. 32 (Q.), in January, 1884, prior to A.'s last payment, and about six months before the date fixed for the expiration of his loan. In October, 1884, the liquidators of the society, in the exercise of the powers vested in the directors under the deed and the society's regulations, passed a resolution declaring a deficit in the business of the

class to which A. belonged, and, in order to provide the necessary funds to meet the proportion of deficit attributed as his share, they thereby exacted from him a further series of twenty-eight monthly payments, in addition to the seventy-two instalments contemplated at the time of the execution of the deed. Subsequently, in 1892, the plaintiff, as transferee of the society, brought action for the two original instalments remaining unpaid, and also for the amount of the twenty-eight additional monthly payments upon the loan and the subscription of shares.

*Held*, that the subscription for shares and the obligation undertaken in the deed constituted, upon the part of the borrower, merely one transaction involving a loan and an agreement to repay the amount advanced with interest and bonuses thereon, amounting together to a rate equivalent to interest at twelve per cent. per annum on the amount of his loan.

That the fact of the building society going into liquidation had the effect of causing all classes of loans then current to expire at the date when the society was placed in liquidation, notwithstanding that the various terms for which such classes had been established had not been fully completed.

That, under the provisions of the statute 42 & 43 V. c. 82, liquidators have the same powers in regard to the determination of the affairs of expired classes, and to declare deficits therein, and to call for further payments to meet the same, as the directors of the society had while it continued in operation.

That the notice required by s. 21 of 42 & 43 V. c. 82 did not apply to cases where liquidators had determined a loss upon the expiration of a class, and required the full amount exigible upon loans to be paid by borrowers.

That, notwithstanding that the liquidation proceedings deprived the directors of the exercise of their powers as to the determination of the condition of the affairs of a class and of the exaction of a further payment when exigible in such cases on the expiration of a class, the resolution of the liquidators determining a deficit in the borrower's class and requiring full payment of all sums exigible under his deed of obligation, was sufficient to constitute a valid right of action against the borrower for the amount of the balance of principal money lent together with the interest and bonus instalments remaining due

thereon according to the terms and conditions of his deed of obligation.

Judgment of the Court of Queen's Bench reversed.

*Held*, further, affirming the decisions of both Courts below, that in an action where no special demand to that effect has been made, the Court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of Art. 1484, C. C.

*Trenholme*, Q.C., and *Beique*, Q.C., for the appellant.

*Geoffrion*, Q.C., and *P. H. Roy*, for the respondents.

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NOVA SCOTIA.]

[1ST MAY, 1897.]

PUDSEY v. MANUFACTURERS' ACCIDENT INS. CO.

*Accident insurance—Renewal of policy—Payment of premium—Promissory note—Instructions to agent—Agent's authority—Finding of jury.*

A policy issued by the company in favour of P. contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect until the premium was paid prior to any accident on account of which a claim should be made, and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director, and countersigned by the agent.

P. having been killed in a railway accident, payment on the policy was refused on the ground that it had expired and not been renewed. In an action by the widow for the insurance it was shown that the local agent of the company had requested P. to renew and had received from him a promissory note for \$15, the premium being \$16, which the father of the assured swore the agent agreed to take for the balance of the premium, after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt, and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium, it was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt, and was paid no cash. Some four years before this the agent

and all agents of the company had received instructions from the head office not to take notes for premiums, as had been the practice theretofore. The note was never paid, but remained in possession of the agent, the company knowing nothing of it. The jury gave no general verdict, but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of the premium; and that the paper given to P. by the agent, as sworn to by P.'s father, was the ordinary renewal receipt of the company.

*Held*, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that the fair conclusion from the evidence was that, as the agent had been employed to complete the contract and had been intrusted with the renewal receipt, P. might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority, and the policy not forbidding it, and that, notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the Court according to the practice in Nova Scotia.

*Held*, further, that there was evidence upon which it could be found that the transaction amounted to payment of the premium, and it was to be assumed that the act was in the scope of the agent's employment. The fact that the agent was disobeying instructions did not prevent the inference, though it might be considered in determining whether or not such inference should be drawn; and a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial, as the company might have supposed that the plaintiff would seek to show that such receipt had been obtained, and were not taken by surprise.

*Wallace Nesbitt*, for the appellants.

*W. A. B. Ritchie*, Q.C., for the respondent.

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## ONTARIO.

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### Supreme Court of Judicature.

### COURT OF APPEAL.

MEREDITH, C.J.]

[14TH JUNE, 1897.]

#### BRIGGS v. WILLSON.

*Husband and wife—Separate property—Trustee—Statute of Limitations.*

In 1875 land, the separate property of a married woman, was sold, and her husband took the proceeds, which he converted to his own use.

*Held*, that the husband was trustee for his wife of the proceeds, and she could sue him for the same notwithstanding the lapse of time, the Statute of Limitations not applying: 54 V. c. 19, s. 18.

*G. G. Mills*, for the defendant, appellant.

*J. J. Maclaren*, Q.C., for the plaintiff.

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### HIGH COURT OF JUSTICE.

[MOSS, J.A., 9TH JULY, 1897.]

#### *In re* GRANGER.

*Prohibition—General Sessions—Appeal—Order of justices—Children's Protection Acts.*

An application by the Reverend James R. Black, the agent of the Children's Aid Society at Kingston, the complainant, for prohibition to the Court of General Sessions of the County of Frontenac and to David Granger, to prohibit the taking of any further proceedings upon an attempted appeal by Granger

to the Sessions from an order of two justices of the peace, sitting for and at the request of the police magistrate for the city of Kingston, removing from Granger's care his six motherless children, all under twelve years of age.

The order was made under 56 V. c. 45, as amended by 58 V. c. 52.

The applicant contended that no appeal lay to the Sessions, and that, at all events, Granger was not a party to the proceedings and could not appeal.

*Held*, that, though the order was made by two justices of the peace, they were not sitting or acting in their usual capacity of justices, but were performing a special duty as "a judge," to whom such duty is assigned by the Acts in question, and their order was not appealable to the Sessions any more than a similar order made by a Judge of the High Court.

Order made for prohibition.

*H. M. Mowat*, for the applicant.

*Delamere*, Q.C., for Granger.

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## IN CHAMBERS.

[ARMOUR, C.J., 3RD SEPTEMBER, 1897.]

## BUIST v. CURRIE.

*Discovery—Examination of non-appearing defendant.*

An appeal by the defendant John Currie from an order of a local Judge at Barrie requiring the appellant to attend for examination for discovery at the instance of the plaintiff. The appellant had not entered an appearance in the action and the statement of claim had not been served upon him. The action was, however, proceeding to trial as against the other defendants.

*R. McKay*, for the appellant, contended that the plaintiff was not a "party adverse in interest" within the meaning of Rule 489; and also that the appellant was not examinable because

his statement of defence had not been delivered, nor had the time for delivering it expired, as required by Rule 442.

*J. Bicknell*, for the plaintiff.

ARMOUR, C.J., held that the appellant could be examined by the plaintiff, and dismissed the appeal with costs.

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[SNIDER, LO. J., 26TH JULY, 1897.]

TALBOT v. CANADIAN COLOURED COTTON CO.

*Interest—Judgment—Entry—Time.*

This action was tried before STREET, J., and a jury on 14th January, 1897, when a verdict was given for the plaintiff for \$1,200, and the trial Judge then made the following indorsement on the certified copy of pleadings: "Upon the answers of the jury to the questions submitted to them, I order that judgment be entered for the plaintiff for \$1,200, with full costs of the action. Entry of judgment stayed until the case can be brought before the Divisional Court or until further order."

This judgment was affirmed by a Divisional Court, and judgment was entered on the 26th February, 1897, as of the 14th January, 1897. The plaintiff claimed interest on the \$1,200 from the 14th January, but the defendants contended that interest should be allowed only from the 26th February, and relied upon *McLaren v. Canada Central R. W. Co.*, 10 P. R. 328.

By agreement of counsel the question was argued before the local Judge at Hamilton in Chambers.

*D'Arcy Tate*, for the plaintiff.

*Kirwan Martin*, for the defendants.

SNIDER, LO. J.—The section of the Judicature Act and the Rules considered by the learned Master in Chambers in the *McLaren* case have been materially changed. Section 121 of the Act of 1895 and Con. Rules 765 and 775 contain the law and practice now in force governing this question.

Apart from the change thus made, I think the indorsement made by the learned Judge in the *McLaren* case materially



differs from that in this case. Judgment for the plaintiff was not in the former case pronounced as of the date of trial, whereas in this case under consideration it is pronounced in precise terms in plaintiff's favour on the date of trial, 14th January, 1897. The plaintiff had at once the right to judgment, but, at the defendants' request, her right to enter her judgment was stayed until a rehearing by the Divisional Court could be had. If the defendants' contention that, owing to the fact that a stay of entry was granted, interest can only be demanded from the 26th February, when the judgment was entered, be correct, then it seems to me the intention of the provisions of s. 121 of the Act of 1895 would be defeated. By Rule 765 the judgment pronounced by the Court shall take effect from the date on which it was pronounced—14th January, 1897—unless otherwise directed. I do not think that granting a stay of entry, where, as here, the judgment is at once pronounced by the Judge, is "directing otherwise" within the meaning of this Rule.

For these reasons I think that this case is not governed by the decision in *McLaren v. Canada Central R. W. Co.*, and that the plaintiff is entitled, under s. 121 of the Act of 1895 and Rule 765, to interest from the 14th January. The costs of this motion will be costs to the plaintiff.

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### **In the 5th Division Court in the N. C. of North- umberland and Durham.**

[KETCHUM, JUN. J. C. C., 3RD AUGUST, 1897.]

#### **KERR v. ROBERTS.**

*Chattel mortgage—Renewal statement—Credits—Validity of mortgage—  
Division Court—Jurisdiction—Breach of contract.*

The plaintiff and defendant were mortgagees of the same chattels; the defendant, under a mortgage made in December, 1889, and the plaintiff, under one made in February, 1894. Both mortgages were made in good faith and for valuable consideration. The plaintiff's mortgage was duly renewed in 1895, 1896, and 1897. Statements, duly verified, and intended to renew the defendant's mortgage, were filed in each year from 1890

to 1896 inclusive. Payments were made on the defendant's mortgage in 1890, 1891, 1892, and 1896; that in 1890 being the interest payable under the mortgage for that year. In the statements filed on renewal each of these payments was shown and credited, but in the statement of the year in which it was made only. Thus, the statement of 1891 contained no reference to the payment made in 1890, and showed and credited the payment made in 1891 only. The statement of 1892 contained no reference to the payments made in 1890 and 1891, and showed only the payment made in 1892. The statements of 1893, 1894, and 1895 contained no reference to any payments, and showed none; and the statement of 1896 contained no reference to the earlier payments, and showed only the payment made in that year. The statements as to payments made were, in effect, as follows: In 1891 and 1892, that no payments had been made on account of the mortgage except the payment made in that year; in 1893 and 1894, that no payments had been made on account of the mortgage *since last renewal*; in 1895, that no payments had been made on account of the mortgage; and in 1896, that no payments had been made on account of the mortgage except the payment made in that year. But the mortgage account, in the statements after 1891, was carried on from year to year, as a continuous account, balanced yearly, beginning in each case with the balance or amount still remaining due at the date of the former statement, and dealing only with the charges and credits of that year. In the statement of 1891 the account began as follows: "Principal, \$150." A charge for interest for a year and another for costs of renewal were added, and the payment of that year was deducted, leaving a balance of \$136 as the amount still remaining due. The account in 1892 began with that balance, described as "principal as per last renewal, \$136," to which charges were added for interest and costs, and the payment made in 1892 was deducted, leaving a balance that was carried forward as the beginning of the account in the following year. This process was repeated in each of the succeeding years, except that, as already stated, there was no credit or deduction in any year in which no payment was made, and in each statement the first item in the account was referred to as being the balance shown by the previous statement. There was, also, in each of the renewals from 1891 and 1896 inclusive, a statement that the

mortgage had been previously renewed, mentioning the year or years in which it was so renewed. In April, 1897, the defendant seized and sold the chattels under his mortgage, and received the proceeds, amounting to \$135. The plaintiff sued to recover those proceeds, claiming \$100, and abandoning the excess, contending that the defendant's mortgage had not been legally renewed, and that it had ceased to be valid as against him.

For the defendant it was argued that the course pursued in the renewals was a substantial compliance with the provisions of the Act, and that, as s. 11 of R. S. O. c. 125 required a statement that manifestly covered only the preceding year, the statements under s. 14 should be "in accordance with section 11," if they, also, were each confined to the transactions of the preceding year; and it was stated that this was the view and practice of many able and careful solicitors. It was also argued that, in any case, the earlier statements, being on file and open to inspection, and being referred to in the later ones in the manner described, might and should be read with the later statements, so that each statement should include all prior ones, and show all the payments made. Also, that there being no fraud or improper motive on the part of the defendant, and all the payments being duly credited, the error, if there was error, should be held to be immaterial, and not fatal to the security. Also, that the plaintiff's cause of action, if any, was one under s. 70 (a) of the Division Courts Act, in which the jurisdiction of the Division Courts is limited to \$60.

There was no attempt to correct the statements, under s. 15 of the Act of 1894.

*Held*, that the words in s. 11 "and showing all payments made on account thereof," which must be deemed to be incorporated in s. 14 by the language of that section, and the words of the form, schedule B, "no payments have been made on account of the said mortgage," or, "the following payments, and no other, have been made on account of the said mortgage," are plain, and cannot be judicially construed to authorize the omission of payments that have not been made within a year; and that, to satisfy the plain requirements of the Act, every statement on renewal must show all payments made on account of the mortgage *since the date of the mortgage*.

That the earlier statements in this case cannot be read with or in aid of the later statements so as to supply to the latter information required by the Act, which they lack ; for, first, s. 14 requires " another statement," that is, a separate and distinct statement from that required by s. 11, and from any previously filed under s. 14 ; secondly, the earlier statements were not filed with the later ones, or within the thirty days mentioned in s. 14, and statements filed prior to the thirty days mentioned are of no effect as renewals under that section : *Beaty v. Fowler*, 10 U. C. R. 382 ; *Griffin v. McKenzie*, 46 U. C. R. 93 ; and, thirdly, if a statement filed in one year could be re-filed with the statement of the following year, it could not be read in aid of the latter, unless it was referred to in the later statement in such a manner as to make it a part of that statement ; and the references to the earlier renewals and statements contained in the later ones, in this case, were insufficient to connect the earlier with the later as parts of one statement.

*Held*, also, though admitting the good faith of the defendant and the hardness of the decision in his case, that the object and purpose of the Act demanded a strict construction and observance of its provisions in all cases where a departure from that course would sanction questionable methods, which, though innocent and harmless in some cases, might, in other cases, be used for a fraudulent purpose ; and that where the statute expressly requires that certain information shall be given in a statement, the omission of that information from the statement, whether intentional or otherwise, must be regarded as a material omission, and fatal to the validity of the statement and of the security.

*Held*, therefore, that the defendant's mortgage ceased to be valid as against creditors, and subsequent purchasers and mortgagees in good faith, in December, 1891, and that the plaintiff was entitled to recover.

*Held*, as to the question of jurisdiction, that a person whose goods have been wrongfully taken and sold by another, and who waives the tort, and adopts the sale, may recover from that other person the proceeds of the sale received by him, to an amount not exceeding \$100, in the Division Court ; the cause of action being the breach of an implied contract by the defend-

ant to pay over the proceeds to the plaintiff, and within s. 70 (b) of the Act.

Judgment for the plaintiff for \$100 and costs.

*J. W. Kerr*, the plaintiff, in person.

*E. C. S. Huycke*, for the defendant.

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## NEW BRUNSWICK.

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In the Supreme Court.

IN EQUITY.

[BARKER, J., 17TH AUGUST, 1897.]

KENNEDY v. NEALIS.

*Ship—Mortgage—Power of sale—Invalid exercise—Account.*

Where a mortgagee of a vessel took possession and sold it to a clerk in his employment, who immediately transferred the vessel to the mortgagee, and the mortgagee managed the vessel until her loss some months after, he was held chargeable with the fair value of the vessel at the time he took possession.

*LeB. Tweedie*, for the plaintiff.

*M. McDonald*, for the defendant.

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WORDEN v. RAWLINS.

*Costs—Set-off—Solicitor's lien.*

The plaintiffs recovered a judgment in the Supreme Court against R., and brought a suit to set aside a bill of sale given a few days previous to the date of the judgment. The grantee settled the suit, and the grantor being insolvent and having left the Province, the suit was not prosecuted against him. His solicitor applied to have the suit dismissed as against him, which was allowed with costs, and the plaintiffs now applied to set off their judgment against these costs.

*Held*, that the solicitor's lien attached to the costs ; but, under the circumstances, the application was dismissed without costs.

*W. H. Trueman*, for the applicants.

*J. R. Armstrong*, Q.C., contra.

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*Ex parte* GILBERT.

*Arbitration and award—Appeal—Principle of decision.*

The Act 57 V. c. 74, in amendment of the Act to incorporate the Saint John Horticultural Association, after providing for the expropriation of private property required by the association and the determination of the value of property taken, by s. 14 enacts as follows : " Any party to the arbitration may, within one month after receiving a written notice from one of the arbitrators of the making of the award, appeal therefrom upon any question of law or fact to a Judge of the Supreme Court, and upon the hearing of the appeal the Judge shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators, as in a case of original jurisdiction. The Judge, upon such appeal, shall have the right to hear additional evidence, and decide the question upon the original as well as the new evidence. Upon such appeal, the practice and proceedings shall, except as hereinbefore provided, be, as nearly as may be, the same as upon an appeal from the decision of a Supreme Court Judge." Upon an appeal under the Act :—

*Held*, that the Judge on appeal was not to disregard the judgment of the arbitrators or deal with the evidence as if it had been adduced before him in the first instance, but that he should deal with it as on an appeal from an inferior Court.

*G. G. Gilbert*, Q.C., for the Messrs. Gilbert.

*Pugsley*, Q.C., and *A. H. Hanington*, Q.C., for the association.

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MUTUAL LIFE ASSURANCE COMPANY OF NEW YORK v. ANDERSON.

*Life insurance—Insurable interest—Wager policy—Pleading—Allegation of fraud—Charge not sustained—Costs.*

A. applied to the plaintiffs' agent at Moncton for three

policies of insurance for \$1,000 each on his life. Upon their delivery by the plaintiffs to their agent, A. assigned them for \$25 to B., who also paid the premiums. In a suit by the plaintiffs to set aside the policies on the ground that they were obtained by A.'s fraudulent misrepresentation, it appeared that A. took out the policies with the intention of raising money by an assignment of them, but that he intended the policies should be retransferred to him and be carried by him for his own benefit. The assignee, on the other hand, testified that A. parted with all his interest in the policies.

*Held*, that the policies were not wager policies.

In the above suit B. was charged with being a party to the fraud committed by A., but at the hearing the charge was not sustained as against B. Prior to the commencement of the suit the plaintiffs' agent advised B. of the circumstances under which the policies had been obtained, and asked him to surrender them, and tendered him the money B. had paid as premiums and to A. B. declined the offer.

*Held*, that as B. was responsible for the litigation, he was not entitled to costs in respect to the defence he had put in to the unfounded charge of fraud, and to which he ordinarily would be entitled.

*Held*, also, that plaintiffs should only have costs of suit against A.

*Pugsley, Q.C., and A. G. Blair, Jr., for the plaintiffs.*

*W. B. Chandler, for the defendant B.*

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### MUTUAL LIFE INS. CO. v. JONAH.

*Evidence—Proof of fraudulent intent—Similar acts of fraud.*

Where a defendant is charged with a fraudulent intent in procuring an insurance on the life of another person for his own benefit, it is good evidence as bearing upon that intent, that in other cases, before as well as after, he had engaged in other transactions of a like character with the same fraudulent intent.

*Pugsley, Q.C., and A. G. Blair, Jr., for the plaintiffs.*

*W. B. Chandler, for the defendants.*

[27TH AUGUST, 1897.]

## GAULT v. YOUNGCLAUS.

*Practice—Setting cause down for hearing—Clerk's certificate.*

On an application to set a cause down for hearing it is sufficient if the plaintiff's solicitor makes an affidavit of the state of the cause without the production of the clerk's certificate.

*A. O. Earle*, Q.C., for the plaintiff.

*C. A. Stockton*, for the defendants.

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 IN CHAMBERS.

[TUCK, C.J., 18TH AUGUST, 1897.]

## TROOP v. EVERETT.

*Practice—Death of parties—Entering suggestion on record—Order of Court—Costs.*

This cause was tried before the Circuit Court, and resulted in a verdict for the plaintiffs. The defendants applied to the full Court for a new trial, and an order was made directing a new trial. The plaintiffs appealed from this judgment to the Supreme Court of Canada, and judgment was given there dismissing the appeal. Subsequently one of the plaintiffs and one of the defendants died. The surviving plaintiffs applied for an order to authorize them to enter suggestions or a suggestion on the record of the death of the deceased plaintiff and defendant. The surviving defendants opposed the application chiefly on the ground that the attorney of the surviving plaintiffs could enter the suggestions or a suggestion himself without applying to a Judge.

The order was granted without costs.

*C. A. Palmer*, Q.C., for the surviving plaintiffs.

*A. H. Hanington*, Q.C., and *T. Milledge*, Q.C., for the surviving defendants.



[24TH AUGUST, 1897.]

## GREENE v. PUGSLEY.

*Attorney—Action against—Plea in abatement—Embarrassment—Delay.*

In this cause the defendant, an attorney of the Supreme Court, was sued in a personal action, on the common counts, for money paid and money had and received. He pleaded in abatement as follows: "The defendant, in person, prays judgment of the writ and declaration herein, and that the same may be quashed, because he says that before and at the time of the issuing of the writ of summons in this cause he was and from thence hitherto has been and still is an attorney of this Court, as by the roll of attorneys of this Court here fully appears, and hath prosecuted and defended, and still doth prosecute and defend, divers suits and pleas in the said Court, for divers persons as their attorney, and that he was before and at the time of the issue of the said writ of summons, and has ever since been and still is, duly qualified to practise as such attorney, and that, according to the immemorial custom and privilege of the said Court, every attorney of the Court who is sued in any personal action ought to be sued by bill, filed and exhibited against him as being present in Court, and that no attorney is compellable against his will to answer any plea in any personal action prosecuted by writ of summons; and the defendant further says that he is impleaded by the writ of summons issued in this cause against his will and against the customs and privileges aforesaid, and this the defendant is ready to verify; wherefore he prays judgment of the said writ and declaration that the same may be quashed."

The plaintiff applied, under 60 V. c. 24, s. 133, to have the plea struck out, upon the ground that it was so framed as to prejudice, embarrass, and delay the fair trial of the action; and that, under C. S. N. B. c. 37, s. 2, and 60 V. c. 24, s. 35, an attorney of the Supreme Court of this Province is not entitled to be sued by bill, but may be sued in any personal action, except replevin and proceedings in *scire facias*, by writ of summons.

*Held*, that the plea was bad, and was pleaded to delay the fair trial of the action; and that, under C. S. N. B. c. 37, s. 2, and 60 V. c. 24, s. 35, an attorney of the Supreme Court of this

Province may be sued in all personal actions, except replevin and proceedings in *scire facias*, by writ of summons.

It was ordered that the plea be struck out, and that the defendant have leave to plead *de novo* within twenty days, and the plaintiff, if necessary, be allowed to give a short notice of trial.

*Daniel Jordan*, Q.C., for the plaintiff.

*A. O. Earle*, Q.C., and *A. W. MacRae*, for the defendant.

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*In re* SAINT JOHN BUILDING SOCIETY.

HAYES' CASE.

*Company—Winding-up—R. S. C. c. 129, ss. 43, 44—Executors—Contributories—Interest—Appeal.*

In this matter the liquidators applied to have the executors of one Edward Hayes, deceased, placed on the list of contributories, and for leave to add interest. It appeared that some time before Hayes died his name was placed on the list of contributories, but the amount he was liable to contribute was never paid.

*Held*, that, under the Winding-up Act, R. S. C. c. 129, ss. 43 and 44, the Court has authority to place executors on the list of contributories.

It was ordered that the executors be placed on the list of contributories, but that under the circumstances no interest be allowed.

The executors applied for leave to appeal to the full Court, but leave was refused.

*C. J. Coster*, for the liquidators.

*John L. Carleton*, for the executors.

## IN EQUITY CHAMBERS.

[TUCK, C.J., 28<sup>TH</sup> JULY, 1897.]*In re* CONSOLIDATED ELECTRIC CO.

*Affidavit—Foreign deponent—Order to bring before the Court—Cross-examination—53 V. c. 4, s. 81.*

In this matter the petition upon which the motion was depending was verified by the affidavit of one L., whose place of residence was in the city of Boston, Massachusetts, one of the United States of America. Under 53 V. c. 4, s. 81, respecting the practice and proceedings in the Supreme Court in Equity, an application was made for an order to have L. brought from Boston before the Court that he might be cross-examined upon the statements sworn to in his affidavit.

The following is the section referred to: "81. Upon the hearing of any cause or motion depending in the said Court, the presiding Judge may, on application of either of the parties, or at his own discretion, require the production and oral examination before himself, or any other Judge of the said Court, of any party in the cause, or any witness or person who has made an affidavit therein, and may direct the costs of and attending the production and examination of such party or witness to be paid by such of the parties to the suit or in such manner as he may think fit."

*Held*, that the application was unreasonable, and no authority or precedent was produced to warrant such an order. Hence, under the circumstances, the order would be refused.

*Pugsley*, Q.C., for the application.

*H. H. McLean*, contra.

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## MANITOBA.

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In the Queen's Bench.

[FULL COURT, 10TH JULY, 1897.]

SIFTON v. COLDWELL.

*Stakeholder—Set-off—Note held for collection—Notice of assignment after right of set-off accrued.*

An appeal from the judgment of the County Court of Brandon. Harrington and Chambers being entitled to certain contract moneys, one Hanbury, claiming to be a creditor of Chambers, intervened, and it was arranged that the amount which Hanbury claimed against Chambers should be deposited with the defendant on the terms of a letter which he wrote to Harrington on 5th September, 1895, as follows:—"I hereby acknowledge to have received from you on 8th February, 1895, \$184, to be held by me as a 'deposit for claim of W. Hanbury against T. Chambers,' or to be deposited by me where directed and agreed upon by Hanbury and Chambers, pending a contest or settlement between Hanbury and Chambers over the claim of Hanbury v. Chambers for wages for work done on school building, in consideration whereof I, on behalf of Hanbury, withdraw all claim to certain unpaid moneys in hands of Dominion Government."

Hanbury sued Chambers and recovered judgment against him for \$65.35, which left in the defendant's hands \$68.65.

Previous to this judgment a note made by Chambers in favour of Johnson had been transferred to the defendant, and between the time of the transfer and the judgment Chambers had assigned his interest in the moneys to the plaintiffs.

The defendant claimed to set off the note against the amount in his hands, and the plaintiffs claimed the amount under their assignment.

The Johnson note had been transferred to the defendant merely for the purpose of being set off by the defendant against the amount due Chambers, and the defendant held the same merely as trustee for Johnson.

The judgment against Chambers was recovered on 8rd December, 1896, and notice of the assignment to the plaintiffs was not given until 12th February, 1897.

The County Court Judge entered judgment for the defendant, and the plaintiffs appealed.

*Held*, that the appeal should be dismissed with costs.

The defendant had an undoubted right to apply the \$68.65 in his hands on the Johnson note. It was true he held the note only for the purpose of collecting it, and as a trustee for Johnson, having no beneficial interest in it, but the note had been indorsed to him, he had the legal title to it, and could have asserted that legal title by suing upon it in his own name: *Shepley v. Hurd*, 8 A. R. 549. As he could have sued upon the note in his own name, so he could, had Chambers sued him for the balance of \$68.65, have pleaded the note by way of set-off. At the time this right of set-off arose, and when the defendant applied on the note the money in his hands, he had no notice of the assignment under which the plaintiffs claimed. Under *Roxburgh v. Cox*, 17 Ch. D. 520, notice after the right of set-off arose would not affect the right.

*O. H. Clark* and *A. D. Cameron*, for the plaintiffs.

*Ewart*, Q.C., for the defendants.

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### AITKEN v. DOHERTY.

*County Court appeal—Right of appeal—Forum—Amount in question—Jurisdiction.*

County Court appeal. The plaintiff sued for the wrongful and malicious seizure and impounding of his cattle, claiming \$200 damages. The defendants had a verdict and the plaintiff appealed.

When the appeal came on for argument, counsel for the defendants contended that there was no appeal to the full Court, under the County Court Act of 1896, which provides for an appeal to a Judge where the amount in question, or where the

value of the goods in question, does not exceed \$50, and to the Court of Queen's Bench *in banc* where the amount or value exceeds \$50.

The plaintiff valued the three animals in question at \$16 to \$18 each, the poundkeeper at \$14 or \$15, and the County Court Judge valued the three at \$42.

*Held*, that the appeal should be struck out with costs. It was clear from the evidence that the amount in question, *i.e.*, the amount that the plaintiff could recover, was within \$50, and the appeal should not have been made to the full Court.

*Elliott*, for the plaintiff.

*O'Reilly* and *Phippen*, for the defendants.

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[DUBUC, J., 20TH JULY, 1897.]

*In re* TAYLOR AND CITY OF WINNIPEG.

*Municipal corporations—By-law—Licensing powers—Regulation of dairies—Inspection—Reasonableness of by-law—Application to quash.*

Application to quash a by-law of the city of Winnipeg for the licensing, inspecting, and regulating of dairies and vendors of milk.

A by-law of similar purport, though some of its provisions were different, had been previously quashed: 11 Man. L. R. 420, 17 Occ. N. 39. Since then the provisions of the Municipal Act respecting dairies and the sale of milk had been amended by 60 V. c. 20, s. 14, the powers of municipal councils having been extended and increased. The by-law in question had been passed since the amending Act. Clause 8 provided that "every person . . . who sells . . . milk for use in the city shall first obtain a milk vendor's license . . . and without such license no person shall sell any milk for use in the city."

Objection was taken that there was no authority in the statute for such prohibition. The applicant contended that the council had the power to prevent or regulate the sale of milk in the city, but not the sale of milk outside of the city limits for use in the city.

*Held*, that, although the city council could not directly enforce its regulations outside of the city limits, in a matter like this, it could do so indirectly by refusing a license to those selling milk in the city or for use in the city. The object of the by-law was to afford protection to the health of people living in the city; the provisions were within the powers given to the council and were not unreasonable.

Clause 8 of the by-law, s.-s. a, provided for inspection and separation of animals where any were diseased, and "the veterinary inspector shall make further inspection of the animals at first appearing well to find if they, or any of them, have developed such disease."

It was objected that the veterinary surgeon was given power to delay the second inspection, and thereby to injure the dairyman.

*Held*, that the veterinary surgeon was not given undue and unreasonable powers, and they were authorized by the statute.

Clause 12 of the by-law provided that if any objections to the report of the veterinary inspector were filed, "a meeting of the market, license, and health committee shall be called to hear and determine as to the objections and as to the issue of a license, which, if directed by said committee, shall be at once issued by the health officer."

It was contended that the words, "if directed by the said committee," were objectionable, because they left the issue of the license to the discretion of the committee, which might exercise it in an arbitrary and unfair manner.

*Held*, that the powers to hear and decide such objections were authorized by the statute. The words must be read with the rest of the sentence, and in connection with it; they meant that the committee shall direct or withhold the issue of the license after hearing and determining the objections raised against the report.

Application refused with costs.

*Mathers*, for the applicant.

*I. Campbell*, Q.C., for the city of Winnipeg.

## NORTH-WEST TERRITORIES

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In the Supreme Court.NORTHERN ALBERTA JUDICIAL  
DISTRICT.

[SCOTT, J., 9TH JULY, 1897.]

## REGINA v. MITCHELL.

*Justice of the peace—Adjournment to consider judgment—Conviction—Jurisdiction—Certiorari—Quashing conviction.*

On an application for *certiorari* and to quash a summary conviction, one of the grounds was that the convicting justice, having reserved judgment at the conclusion of the hearing, without adjourning to any stated time, subsequently gave judgment without any notice to the defendant, though later in the day he wrote to the defendant's advocates stating that he had found the defendant guilty, etc.

*Held*, an excess of jurisdiction. It may be necessary for the proper protection of his interests that the defendant should be present or represented by counsel when judgment is given, *e.g.*, in order that he may know within what time he ought to give notice of appeal. In the present case notice was given on the same day, but the validity of the conviction cannot be dependent on a subsequent act.

The justice having returned the record, an order was made quashing the conviction, *certiorari* being unnecessary.

*Regina v. Hall*, 12 P. R. 142, and *Regina v. Morse*, 11 Occ. N. 342, referred to.

*Bennett*, for the defendant.

*Barnes*, for the prosecutor and magistrate.



[27TH JULY, 1897.]

*In re* CALGARY AND EDMONTON R. W. CO.

*Land Titles Act—Assurance fund—Fee payable on transfer—Improvements made by transferee prior to registration of transfer.*

The railway company entered into an agreement with the H. B. Company for the purchase of certain lands, which at the time of the issue of the certificates of title to the latter were unincumbered. Prior to the execution of transfers from the vendors to the purchasers, the latter improved the lands by building road-beds, erecting station-houses, etc. On the purchasers presenting transfers from the vendors for registration, and applying for a certificate of title, the registrar demanded payment of the percentage of value fixed by s. 115 of the Land Titles Act, 1894, for the assurance fund, on the value of the improvements, as well as of the soil. The railway company objected to this on the ground that, as the improvements were made by and belonged to them, they should be charged only on the value of the lands as owned by their vendors.

*C. C. McCaul*, Q.C., for the railway company.

*H. Harvey*, the registrar, in person.

SCOTT, J.—In my opinion, the value of all the improvements, by whomsoever made, existing at the time of the issue of the certificate of title to the transferee, must be taken into consideration in fixing the amount of the fee payable in respect of the assurance fund.

The words “the value of the land transferred,” in s. 115, are merely words of description, and are not intended to refer to the value of the interest transferred.

The assurance fund is a fund applicable to all lands in respect of which certificates of title are issued, and the fee payable to it upon the issue of any certificate of title cannot be considered applicable to the particular lands comprised in the certificate, and therefore it cannot be considered an injustice that a transferee who makes improvements upon the land before he obtains his certificate of title should be called upon to pay the fee in respect of such improvements.

That this is the correct interpretation of s. 115 is further shown by the concluding provision of the section, viz., that upon any subsequent transfer of land in respect of which an assurance fund fee has been paid, the fee shall be payable only

upon the increased value since the granting of the last certificate. If the value of improvements made by a transferee before he obtained his certificate of title were not taken into consideration at the time he obtained it, it would necessarily follow that they never would be considered, because, upon a subsequent transfer by him, only those improvements made subsequent to the granting of his certificate would be considered.

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IN CHAMBERS.

[ROULEAU, J., 30TH APRIL, 1897.]

McLAUGHLIN v. WIGMORE.

*Contract—Illegality—Rescission—Pleading—Striking out.*

Summons to strike out the statement of claim as embarrassing and not disclosing any reasonable cause of action.

The statement of claim alleged that a certain chattel mortgage made by the plaintiff and another in favour of the defendants was given for an unlawful purpose, and was contrary to public policy and therefore absolutely void, and he claimed the chattels seized by the defendants under the mortgage.

*Held*, that neither of the parties to an illegal contract can invoke the aid of the Court either to enforce the execution of it or to recover damages for the breach of it, if executory, or to disturb the condition of affairs when the contract is once executed.

*Ex p. Butt*, 4 Ch. D. 150, specially referred to.

*Held*, also, that it is illegal to become surety in any criminal proceeding in consideration of taking a chattel mortgage or other security, because it takes away from the law and the authority of the law what was intended to be given to it.

*Hermann v. Jenchner*, 54 L. J. Q. B. 840, specially referred to.

The plaintiff based his action to recover back his chattels on an illegal contract. His action could not be entertained, because he was a party to that illegal contract, and therefore must be dismissed with costs.

*Nolan*, for the plaintiff.

*Muir*, Q.C., for the defendants.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

DIVISIONAL COURT.]

[14TH SEPTEMBER, 1897.

## ARMSTRONG v. LYE.

*Principal and agent—Attorney for sale of lands—Direction to pay advance out of proceeds—Attorney subsequently purchasing—Personal liability of attorney—Equitable assignment—Acknowledgment—Registry Act—Notice—Lien.*

Where the attorney under an irrevocable power from the owner for the sale or other disposition of certain lands, and entitled in the event of sale to a share of the proceeds after payment of charges, agrees to pay out of the proceeds the amount of a further charge made by the owner, he is not personally liable to pay that charge, but the chargee is entitled to enforce his charge as an equitable assignment of the proceeds of sale.

Judgment of a Divisional Court, 27 O. R 511, 16 Occ. N. 218, reversed; MACLENNAN, J.A., dissenting.

Execution of the document creating the further charge was proved by affidavit, and attached to it, but without any proof of execution, were the agreement by the attorney to pay the charge and a transfer by the chargee to the plaintiff of the charge, and all the documents were accepted by the Registrar and registered.

*Held*, affirming the judgment of the Court below, that the defect in registration was cured by s. 80 of the Registry Act, R. S. O. c. 114, and that the attorney, who subsequently

became himself the purchaser of the lands in question, was affected with notice of the plaintiff's rights.

*J. B. Clarke, Q.C., and F. A. Hilton, for the appellant.*

*Watson, Q.C., W. Read, and R. Ruddy, for the respondents.*

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### OSTROM v. SILLS.

*Water and watercourses—Surface water—Easement—Lands of different levels.*

The relationship of dominant and servient tenement does not exist between adjoining lands of different levels, so as to give the owner of the land of higher level the legal right, as an incident of his estate, to have surface water falling on his land discharged over the land of lower level, although it would naturally find its way there. The owner of the land of lower level may fill up the low places on his land or build walls thereon, although by so doing he keeps back the surface water to the injury of the owner of the land of higher level.

Judgment of a Divisional Court reversed.

*Clute, Q.C., and J. Williams, for the appellants.*

*C. J. Holman and E. G. Porter, for the respondent.*

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### *In re* RUBY—TRUSTS CORPORATION OF ONTARIO v. RUBY.

*Partnership—Joint and separate creditors—Administration.*

In the administration by the Court of the insolvent estate of a deceased partner, the surviving partner is entitled to rank for a balance due to him in respect of partnership transactions and partnership debts paid by him, when, even apart from his claim, there would be no surplus available for partnership creditors.

Judgment of a Divisional Court reversed; OSLER, J.A., dissenting.

*R. S. Cassels, for the appellant.*

*J. B. Clarke, Q.C., and Aylesworth, Q.C., for the respondents.*

## BOULTBEE v. GZOWSKI.

*Broker—Sale of shares—Undisclosed principal—Marginal transfer—Indemnity.*

A broker who buys bank shares for an undisclosed principal, and does not accept the shares himself, but, pursuant to a general power to transfer given by the vendor, transfers them to his principal, is not liable to indemnify the vendor against the statutory "double liability" which the principal fails to pay.

Judgment of a Divisional Court, 28 O. R. 285, *ante* 79, reversed.

*Aylesworth*, Q.C., and *W. Barwick*, for the appellant.

*H. J. Scott*, Q.C., and *R. Boulton*, for the respondent.

## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 7TH SEPTEMBER, 1897.]

## VANSICKLE v. AXON.

*Discovery—Production of documents—Affidavit—Objection to produce—Specification of document.*

Decision of Moss, J.A., *ante* p. 261, affirmed on appeal.

*R. McKay*, for the plaintiff.

*Lynch-Staunton*, for the defendant Frederick Axon.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 15TH SEPTEMBER, 1897.]

## ALDIS v. CITY OF CHATHAM.

*Municipal corporations—Highway—Negligence—Accident—Notice of—*  
55 V. c. 42, s. 531 (1)—57 V. c. 50, s. 13—59 V. c. 51, s. 20.

The latter part of the clause added to s. 531 (1) of the Consolidated Municipal Act, 1892, by 57 V. c. 50, s. 13, as amended by 59 V. c. 51, s. 20, whereby it is provided that "no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the

cause thereof has been served," applies to all cases of non-repair of highways, etc., and is not confined to cases where the non-repair is by reason of the corporation not removing snow or ice from the sidewalks.

*Drennan v. City of Kingston*, 23 A. R. 406, discussed.

*Edwin Bell*, for the plaintiff.

*W. Douglas*, Q.C., for the defendants.

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[17TH SEPTEMBER, 1897.]

REGINA v. WILLIAMS.

*Criminal law—Crown case reserved—Rejection of evidence—Discharge of prisoner—Service of case—Motion for new trial.*

Crown case reserved by ROBERTSON, J., at the Napanee Assizes.

The defendant was tried upon an indictment for manslaughter. He had appeared at the coroner's inquest as a witness and given his evidence, not being then charged with the death. At the trial counsel for the Crown proposed to give in evidence the depositions of the defendant before the coroner. Following *Regina v. Hendershott*, 26 O. R. 678, the Judge rejected the evidence, but reserved for the consideration of the Court the question whether he was right in so rejecting it. The prisoner was acquitted.

*J. R. Cartwright*, Q.C., for the Crown, stated that the case was important in view of the decision referred to above and the case of *Regina v. Madden*, 14 Occ. N. 505.

No one appeared for the defendant.

A copy of the case and notice of the hearing had been served upon the solicitor who had acted for the defendant at the trial.

THE COURT held that the solicitor ceased to represent the defendant when the latter was discharged, and that there was no cause pending in Court unless the Crown were asking for a new trial.

The case was allowed to stand over, counsel for the Crown desiring to move for a new trial and to serve notice upon the prisoner personally.

[Moss, J.A., 20TH JULY, 1897.]

*In re* MILLS—NEWCOMBE v. MILLS.

*Administration—Satisfaction of claim against estate—Insurance for benefit of child—Evidence.*

A man, having been appointed administrator of his deceased wife's estate, received after her death certain moneys payable under a mortgage of which she had died possessed, and appropriated them to his own use. In the course of the administration by the Court of his own estate, a claim was put in by his only surviving daughter to these mortgage moneys. In opposition to the claim, however, it was alleged that a certain policy of insurance upon his life, which, under the Act to secure to wives and children the benefit of life insurance, he had declared to be for the benefit of his daughter, and the proceeds of which had been received by her guardian, was a satisfaction of her claim. No evidence was offered to prove that such was the intention of the insured, except certain alleged oral statements by him in his lifetime.

*Held*, that, even if it was open to any one, after the death of the insured, to show, upon evidence of expressions of intention, understandings, or bargains made or come to before effecting the insurance, and to which the beneficiary was no party, that the money secured was, when paid, not to be for her absolute benefit, but subject to be used for the purpose of indemnifying the estate of the insured, which was doubtful; it should, at any rate, only be by means of some writing. There should at least be something evidencing the trust or obligation as formal as the Act requires in the case of changes in the designation of or apportionment among the beneficiaries.

*J. M. Glenn* and *W. L. Wickett*, for the appellant.

*C. F. Maxwell*, for the plaintiff and defendants *David H. Gooding* and *Mary E. Mills*.

*F. W. Harcourt*, for the infant defendants.

## IN CHAMBERS.

[MEREDITH, C.J., 13TH SEPTEMBER, 1897.]

*In re* JONES v. JULIAN.

*Prohibition—Division Court—Jurisdiction—Trial by jury—Questions submitted—Verdict entered thereon by Judge.*

Motion by the defendant for prohibition to the 3rd Division Court in the county of Essex, on the ground that the Judge presiding therein, wrongfully and without jurisdiction, deprived the defendant of his right to a trial by jury of all the questions arising in the action, and of his right to a general verdict at the hands of the jury.

The Judge, without objection, left certain questions to the jury, and upon their answers thereto entered a verdict for the plaintiff.

*D. L. McCarthy*, for the defendant, contended that all the matters in dispute were not covered by the questions put to the jury, and, even if otherwise, that the Judge had no power to enter a verdict upon findings, which was usurping the functions of the jury. He cited *Re Lewis v. Old*, 17 O. R. 610; *Gordon v. Denison*, 22 A. R. 815.

*Douglas Armour*, for the plaintiff.

MEREDITH, C.J., held, upon the evidence, that all the facts really in dispute had been submitted to the jury, and, having been found in favour of the plaintiff, the Judge had the power to enter the verdict upon the answers to questions submitted without objection.

*Re Lewis v. Old*, 17 O. R. 610, distinguished.

Held, also, that by s. 804 of the Division Courts Act, the practice of the High Court was applicable, and that placed the matter beyond doubt.

Motion refused with costs.



[THE MASTER IN CHAMBERS, 11TH SEPTEMBER, 1897.]

TORONTO TYPE FOUNDRY CO. v. TUCKETT.

*Action—Dismissal—Default—Rules 434, 542.*

Rule 434 provides that “in actions in the county of York, to be tried without a jury, if the plaintiff does not set down the action for trial within six weeks after the pleadings are closed and proceed to trial as provided in Rule 542, the action may be dismissed for want of prosecution.”

*Held*, that unless there is default both in setting down and in proceeding to trial, an action cannot be dismissed.

*C. W. Kerr*, for the plaintiffs.

*H. Cassels*, for the defendant.

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NEW BRUNSWICK.

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In the Supreme Court.

IN CHAMBERS.

[TUCK, C.J., 3RD SEPTEMBER, 1897.]

LEBELL v. NORWICH UNION FIRE INSURANCE  
COMPANY.

*Evidence—Foreign commission—Order for—Stay of proceedings.*

The defendants, after notice of trial was served, applied for an order for a commission to examine certain witnesses living in the Province of Quebec, and for a stay of proceedings until the return of the commission. The affidavit upon which the application was made stated the facts to be proved by the witnesses, but did not state their names.

The order for a commission was granted, but the stay of proceedings was refused.

*C. A. Palmer*, Q.C., and *J. B. M. Baxter*, for the plaintiff.

*C. J. Coster*, for the defendants.

[McLEOD, J., 18TH SEPTEMBER, 1897.]

*Ex parte* HAYDEN.*In re* AMLAND.*Absconding debtor—C. S. N. B. c. 44—Affidavits of verification—  
Supersedeas.*

On an application of the debtor, by petition, for a supersedeas of a warrant issued under C. S. N. B. c. 44, relating to absconding, concealed, or absent debtors :—

*Held*, that the affidavits of verification, under oath of two witnesses, of the affidavit of the creditor, must state or contain such facts that the Judge will be satisfied that the debtor has departed from or keeps concealed within this Province with the intent to defraud his creditors ; mere belief that he has departed from or keeps concealed within this Province with the intent to defraud his creditors, is not sufficient.

*Held*, also, that an application for a supersedeas can be made to the Judge who has issued the warrant.

A supersedeas was granted exempting the creditor from liability.

*Ex p. Moore, In re Long*, 23 N. B. Reps. 229, referred to.

*Daniel Mullin* and *C. J. Coster*, for the petitioner.

*H. A. McKeown*, contra.

## In the County Court.

### IN CHAMBERS.

[FORBES, J.C.C., 9TH SEPTEMBER, 1897.]

### MYERS v. NORTHRUP.

*Courts—County Courts Act, 60 V. c. 28, ss. 2, 22—Styling the Court—Irregularity.*

*Held*, that, under the County Courts Act, 60 V. c. 28, ss. 2 and 22, a process issued in “ The County Court of the city and county of Saint John ” is irregular ; the Court must be styled “ The Saint John County Court.”

*W. H. Trueman*, for the plaintiff.

*Daniel Mullin*, for the defendant.

# NORTH-WEST TERRITORIES

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In the Supreme Court.

## NORTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[SCOTT, J., 24TH JULY, 1897.]

*In re* HICKSON AND WILSON.

*Costs—Taxation—Service of summons—Unnecessary services—Prohibition  
—Court of Revision.*

In this case on an application, by summons in Chambers, for a writ of prohibition, the order was made, and affirmed by the Court: *ante* 303. The summons was directed to "Herbert C. Wilson, mayor of the town of Edmonton, and Matthew McCauley, William S. Edmiston, John Kelly, Charles Sutter, Thomas Bellamy, and George Sanderson, councillors of the said town of Edmonton, being the Court of Revision of the said town of Edmonton for the year 1896." Each one of the members of the Court of Revision was personally served with the summons, and also with the writ of prohibition. On the taxation of the applicant's costs, the deputy-clerk at Edmonton held that service on the mayor as being the presiding officer of the Court, or upon the clerk of the municipality, as being the clerk of the Court, was sufficient, and disallowed all services but one of the summons and one of the writ of prohibition. From this holding the relator appealed to a Judge in Chambers at Calgary.

*R. B. Bennett* (instructed by *S. S. Taylor, Q.C.*), for the relator. The Court of Revision was not the council of the municipality of the town of Edmonton, and had no corporate capacity. If only the mayor or clerk had been served, proceedings for contempt could not have been taken against the

Court. In certiorari, where two justices sit, each must be served with notice. See form of mandamus, Short & Mellor's C. C., p. 692, where the writ is addressed to each of the licensing justices by name.

*Muir*, Q.C. (instructed by *Beck & Emery*), for the defendants. The Court of Revision is merely the municipal council acting in a certain capacity: Municipal Ordinance, Part IV., ss. 31 *et seq.*; cf. School Ordinance, 1896, s. 148; Municipal Ordinance, Part III., ss. 28 *et seq.* The defendants had no power, except when assembled, *i.e.*, with a presiding officer and a clerk. It was at least unnecessary to describe the defendants by their individual names. It would have been sufficient to have described them collectively by their official description. Members of the council might have resigned pending the proceedings; their successors would have been equally bound. If viewed as a proceeding against the municipality, service on the mayor or clerk is declared to be sufficient: Judicature Ordinance, ss. 31 (3), 35. If viewed as a proceeding against an independent tribunal, similar service was sufficient: Seton on Decrees, 5th ed., tit. "Prohibition of proceedings in inferior Courts," pp. 688, 689; Shortt on Informations, etc., pp. 483 *et seq.*, 488, 489, 496, and the form of writ of prohibition in appendix.

Scott, J., confirmed the ruling of the deputy-clerk, holding that it was unnecessary to name or serve all the members of the Court. He referred to the case of *Regina v. Mayor of Liverpool*, 18 Q. B. D. 510, as showing that the proceedings should have been directed against the corporation, or the Court of Revision as a Court.

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## Exchequer Court of Canada.

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[BURBIDGE, J., 26TH APRIL, 1897.]

### BRADLEY v. THE QUEEN.

*Crown—Civil Service Act—Civil servant—Extra work—Remuneration.*

The provisions of s. 51 of the Civil Service Act, preventing the payment of any extra salary or additional remuneration to any deputy-head, officer, or employee in the Civil Service of Canada, or to any other person permanently employed in the public service, do not apply to a reporter on the debates staff of the House of Commons.

*W. D. Hogg*, Q.C., for the claimant.

*E. L. Newcombe*, Q.C., for the defendant.

[Affirmed on appeal to the Supreme Court of Canada, 19th October, 1897.]

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[11TH OCTOBER, 1897.]

### DOMINION ATLANTIC R. W. CO. v. THE QUEEN.

*Arbitration and award—Submission by consent—Making award rule of Court.*

The Exchequer Court has no jurisdiction to entertain an application to make an award under a submission to arbitration by consent, in a matter *ex foro*, a judgment of the Court.

*C. J. R. Bethune*, for the motion.

*F. H. Gisborne*, contra.

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### REGINA v. POUPORE.

*Contract—Public work—Negligence—Sufficiency of proof.*

In an action by the Crown for damages arising out of an accident alleged to be due to the negligence of a contractor in the performance of his contract for the construction of a public

work, before the contractor can be held liable, the evidence must show, beyond reasonable doubt, that the accident was the result of his negligence, and must exclude all presumptions as to its having arisen in any other way.

*Osler, Q.C., and E. L. Newcombe, Q.C., for the Crown.*

*W. D. Hogg, Q.C., Aylesworth, Q.C., and J. Christie, for the defendants.*

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### QUEBEC ADMIRALTY DISTRICT.

[ROUTHIER, LOC. J., 3RD AUGUST, 1897.]

#### BELL TELEPHONE CO. OF CANADA v. THE "RAPID."

*Maritime law—Trespass—Interference with submarine cable—Notice—Damages.*

By a regulation passed by the Quebec Harbour Commissioners in 1895, and subsequently approved by the Governor in Council, and duly published, the commissioners prohibited vessels from casting anchor within a certain defined space of the waters of the harbour. Some time after this regulation had been made and published, the commissioners entered into a contract with the plaintiffs whereby the latter were empowered to lay their telephone cable along the bed of that part of the harbour which vessels had been so prohibited from casting anchor in. No marks or signs had been placed in the harbour to indicate the space in question. The defendant vessel, in ignorance of the fact that the cable was there, entered upon the space in question and cast anchor. Her anchor caught in the cable, and in the efforts to disengage it the cable was broken.

*Held*, that she was liable in damages therefor.

*C. A. Pentland, Q.C., for the plaintiffs.*

*A. H. Cooke and Charles Dorion, for the defendants.*

ONTARIO.  

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Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[MACLENNAN, J.A., 20TH OCTOBER, 1897.]

D'IVRY v. WORLD NEWSPAPER CO. OF TORONTO.

*Appeal—Time—Extension of—Special circumstances—Terms—Notice of motion—Late service—Objection.*

Where notice of appeal was given, but the appeal was not set down in due time and a sittings of the Court lost, the time for setting down was extended, as it appeared that there had all along been a *bona fide* intention of appealing, and security had been given for the debt and costs and a large sum paid for a copy of the evidence. The terms of giving further security, setting down the appeal within a limited time, and paying costs in any event, were imposed.

An objection that a notice of motion was served five minutes too late should not prevail where the delay was occasioned by the solicitor having lately changed his office. If necessary, a new service should be permitted.

*H. M. Mowat*, for the plaintiff.

*King, Q.C.*, for the defendants.

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## HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., MEREDITH, J., 4TH OCTOBER, 1897.]

GRIFFIN v. FAWKES.

*Discovery—Production of documents—Deeds relating to plaintiff's title.*

To deny the due execution of a deed sought to be protected, or to set up that it is forged, or to plead *non est factum*, does not give the defendants a right to have it produced on an affidavit

of documents, where the deed is a part of the title to be proved at the hearing by the plaintiff; for the onus of proving it lies upon him, and if he fails he can go no further.

*Frankenstein v. Gavin*, [1897] 2 Q. B. 62, followed.

Decision of STREET, J., affirmed.

*W. R. Smyth*, for the plaintiff.

*Bradford*, for the defendants Shadrach and Drusilla Fawkes.

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*In re JONES v. JULIAN.*

*Prohibition—Division Court—Jurisdiction—Trial by jury—Questions submitted—Verdict entered thereon by Judge.*

The decision of MEREDITH, C.J., *ante* 680, affirmed on appeal.

*W. M. Douglas*, for the defendant.

*Douglas Armour*, for the plaintiff.

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[5TH OCTOBER, 1897.]

*In re GRANGER.*

*Prohibition—General Sessions—Appeal—Order of justices of the peace—Children's Protection Acts.*

An appeal by David Granger from an order made by Moss, J.A., *ante* 384, upon the application of the Reverend James R. Black, the Agent of the Children's Aid Society at Kingston, and the complainant, prohibiting the appellant and the Court of General Sessions for the County of Frontenac from taking any further proceedings upon an attempted appeal by the appellant to the Sessions from an order of two justices of the peace, sitting for and at the request of the police magistrate for the city of Kingston, removing from the appellant's care his six motherless children, all under twelve years of age.

The order of the justices was made under the Children's Protection Act, 56 V. c. 45, as amended by 58 V. c. 52.

The order of prohibition was made on the ground that no appeal lay to the Sessions.

Upon appeal, it was contended by the appellant that the amendment empowering two justices to act introduced the provi-



sions of R. S. O. c. 74, s. 4, by which an appeal is given to the Sessions in case of a conviction or order made by a justice.

The Court dismissed the appeal without costs.

*Per* BOYD, C.—To read R. S. O. c. 74, s. 4, as contended for, would bring in an appeal totally repugnant to the special legislation and inconsistent with the whole machinery devised to promote the well-being of neglected children. The “two justices acting together” constitute the legislative Judge provided by the Act, from which functionary there is no appeal to the Sessions, or indeed any other Court.

*Delamere*, Q.C., for the appellant.

*H. M. Mowat*, for the respondents.

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### FISKEN v. IFE.

*Partition—Summary application by tenant for life—Reversioners.*

An appeal by the plaintiff from an order of ARMOUR, C.J., in Chambers, dismissing a summary application by the appellant for an order for partition or sale of lands in the city of Toronto.

*Held*, that the jurisdiction in partition matters given by R. S. O. c. 104 is not intended to be exercised at the instance of a tenant for life of the whole estate as against any reversioners who object to the sale of the life estate.

*Murcar v. Bolton*, 5 O. R. 164, applied and followed.

Here no partition was needed, or was possible, so far as the estate in possession was concerned, for that was all vested in the plaintiff, who was also part owner of a share in the reversion, but did not desire partition in so far as that interest was concerned. The whole object of the application was to convert the property so as to get rid of the burdens imposed on the tenant for life by the terms of the will under which he held. But he had undertaken this burden voluntarily, and the changed circumstances of the property could not be invoked to convert the land into personalty at the expense or against the reasonable opposition of the reversioners.

Appeal dismissed with costs.

*E. D. Armour*, Q.C., for the plaintiff.

*Arnoldi*, Q.C., for the defendant.

[6TH OCTOBER, 1897.]

## REGINA v. HAMILTON AND BUSTARD.

*Criminal law—Indictment for abortion—Conviction for attempt—Evidence—Leave to appeal.*

An application by the prisoners, under s. 746 of the Criminal Code, for leave to appeal from their conviction, upon an indictment for procuring an abortion, of an attempt to procure an abortion.

The Attorney-General had given his fiat for the initiation of the appeal, and did not oppose this application.

*Osler*, Q.C., and *W. D. McPherson*, for the prisoners, contended that, although evidence was given at the trial which would have supported a conviction for procuring an abortion, no evidence was given which supported the conviction for an attempt, and, as the jury apparently did not believe the evidence actually given, the prisoners should be discharged or there should be a new trial.

THE COURT held that, as there was evidence to show the commission of the greater offence, the jury might believe a portion of it and properly convict of the lesser offence, and it would be mischievous to interfere. Leave refused.

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OWEN v. SPRUNG.

*Division Court appeal—Setting down—Time—Extension of—Powers of High Court.*

Motion by the defendant to strike out an appeal by the plaintiff from the judgment of the 3rd Division Court in the County of Huron as improperly set down on the list. The judgment at the trial dismissing the action was given on the 30th April, 1897, and the plaintiff's motion for a new trial dismissed on the 31st May, 1897. On the 26th June, 1897, notice of appeal was given by the plaintiff, and on the 28th June the appeal was set down. On the same day an application was made to the Judge in the Division Court to extend the time for setting down, which he refused by an order made in August, 1897.

*Aylesworth*, Q.C., for the defendant, contended that this Court had no jurisdiction to entertain the appeal, the provisions of s. 47 of the Law Courts Act, 1895, not having been complied with, citing the *North Ontario Election Case*, *Wheeler v. Gibbs*, 8 S. C. R. 874.

*F. E. Hodgins*, for the plaintiff, contended that, as the fault lay with the clerk of the Division Court, who had not certified the proceedings in time, and as notice was given in time for the then next sittings of this Court, the plaintiff was not in default, and the jurisdiction of the Court not ousted, and that the Court had power, under s. 47, to hear the appeal, citing *Waterton v. Baker*, L. R. 3 Q. B. 173; *Sullivan v. Francis*, 18 A. R. 121; *Simpson v. Chase*, 14 P. R. 280; *Ronald v. Village of Brussels*, 9 P. R. 282; *Park v. Coates*, L. R. 5 C. P. 634.

THE COURT held that it was impossible to get round the statute; that only the County Court Judge could extend the time; and the appeal was, therefore, improperly set down.

Order made striking case out of list without costs and without prejudice to its reinstatement if the time should thereafter be extended upon application to the other Judge of the county, or upon a fresh application to the same Judge who had already refused to extend the time.

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[7TH OCTOBER, 1897.]

### NEVILLS v. BALLARD.

*Criminal law—Assault—Bar of civil action—Conviction for assault causing actual bodily harm—Criminal Code, ss. 262, 866, 799.*

Motion by the defendant to set aside the verdict and judgment for the plaintiff in an action for assault tried before ARMOUR, C.J., and a jury at Hamilton, and to dismiss the action.

*W. R. Riddell*, for the defendant, contended that the action did not lie, because an information for the same assault was laid against the defendant before the action was brought, and the defendant was thereon tried and convicted of the assault by a police magistrate, and paid the fine imposed, all of which appearing by the certificate of the magistrate pleaded in this action and proved at the trial, the action was barred by the provisions of the Criminal Code, 1892, ss. 864, 865, 866.

*Mulvey*, for the plaintiff, contended that the charge laid against the defendant, being of an aggravated assault, came under s. 262 of the Code, and the trial before the police magistrate was as if upon indictment, under the Summary Trials sections (Part LV.), by the consent of the accused, and not upon summary complaint under the Summary Convictions sections (Part LVIII.); and therefore s. 866 did not apply, but s. 799, which does not bar a civil action. *Flick v. Brisbin*, 26 O. R. 423, was cited.

THE COURT *held*, that an assault occasioning actual bodily harm within s. 262 of the Code cannot be tried summarily without the consent of the defendant, under Part LVIII., but may be brought under Part LV. by the election of the person charged, under s. 786, to be tried summarily. In such case, however, a certificate of dismissal or a conviction releases the accused from further *criminal* proceedings only, under s. 799; the release does not extend to civil proceedings, as under s. 866.

[ 20TH OCTOBER, 1897.

### PALADINO v. GUSTIN.

*Security for costs—Slander—52 V. c. 14, s. 1, s.-s. (3)—Meaning of words used—Good defence.*

In an action for slander brought by a married woman the words alleged to have been spoken were "you are a blackguard; you are a bad woman;" and the innuendo was that the plaintiff was a common prostitute and a woman of evil character. Upon an application by the defendant, under 52 V. c. 14, s. 1, s.-s. (3), for security for costs, the defendant admitted having called the plaintiff "a bad, quarrelsome woman," but said he did not recollect using, and believed he had not used, the word "blackguard," and he denied that he used the words with the meaning attributed to them by the plaintiff.

*Held*, MEREDITH, J., dissenting, that the defendant had not shown a good defence to the action on the merits, and his application was properly refused.

*Per* BOYD, C., and FERGUSON, J., that the expressions used might be employed in circumstances and surroundings such that bystanders might think them a statement of want of chastity.

*Per* MEREDITH, J., that, as it was shown by the pleadings and the affidavit of the defendant that there was a real and substantial question for the jury to pass upon, and upon which the action might fail, the defendant had shown a good defence upon the merits.

*J. M. Clark*, for the plaintiff.

*W. E. Middleton*, for the defendant.

[BOYD, C., FERGUSON, J., MOSS, J.A., 8TH OCTOBER, 1897.]

### CULL v. ROBERTS.

*Conditional sale—Action for price—Defence of diminution of value—Pleading.*

When there has been a conditional sale of a chattel, and an action is brought for the price, it may be pleaded in defence that there is a diminution in value, because the article is not as represented.

*Tomlinson v. Morris*, 12 O. R. 311, followed.

Order of 2nd Division Court in the county of Perth reversed.

*J. P. Mabee*, for the defendants.

*J. H. Moss*, for the plaintiff.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 7TH OCTOBER, 1897.]

### HAMMOND v. KEACHIE.

*Costs—Married woman—Judgment against—Costs payable out of separate property—Costs payable to married woman—Set-off.*

Judgment for debt and costs having been recovered by the plaintiffs against the defendant, a married woman, to be levied out of her separate estate, there was an appeal by the plaintiffs with regard to the form of the judgment, which was dismissed with costs.

An application to vary the order made upon the appeal by directing that the costs thereof should be set off *pro tanto* against the amount of the judgment was refused; but the Court intimated that the taxing officer, upon taxing the costs of the appeal,

would have power, under Rule 1164, to set them off *pro tanto* against the costs awarded by the judgment to be levied out of the defendant's separate property.

*Pelton v. Harrison* (No. 2), [1892] 1 Q. B. 118, followed.

*Aylesworth*, Q.C., for the plaintiffs.

*F. C. Cooke*, for the defendant.

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[23RD OCTOBER, 1897.]

REGINA v. VILLENEUVE.

*Liquor License Act—Summary conviction—Permitting liquor to be drunk on premises—Offence—Form of conviction—Evidence.*

On the 14th October, 1897, *Douglas Armour* moved absolute a rule *nisi* to quash the summary conviction of the defendant for that he, being duly licensed to sell intoxicating liquors upon his shop premises in the town of Renfrew, did "permit" liquor sold to a purchaser to be drunk upon such premises, contrary to the statute. The rule was moved upon the grounds that no offence was stated in the summary conviction, and no date stated as that on which the offence was committed, and no purchaser named, and upon other grounds.

*Langton*, Q.C., showed cause.

Section 78 of the Liquor License Act, R. S. O. c. 194, provides that "if any purchaser of any liquor from a person who is not licensed to sell the same to be drunk on the premises, drinks, or causes or permits any other person to drink such liquor on the premises where the same is sold, the seller of such liquor shall, if it appears that such drinking was with his privity or consent, be subject," etc.

On the 23rd October, 1897, it was

*Held, per Curiam*, that the conviction was wholly bad upon its face in not describing the offence as described in the statute (*Boscawen*, 25), and it was impossible to amend it by the evidence, for there was no evidence whatever showing, either expressly or by any reasonable inference, that the drinking was with the privity or consent of the defendant.

*Rule absolute.*

[25TH OCTOBER, 1897.]

## STRATFORD TURF ASSOCIATION v. FITCH.

*Gaming—Sale of betting privileges on race-course—Illegality—Criminal Code, s. 204—Lease of race-course by incorporated to unincorporated association.*

An appeal of the defendants from an order of the Judge of the County Court of Wentworth refusing to set aside judgment for the plaintiffs and direct a new trial of an action in the 9th Division Court in the county of Wentworth, brought to recover \$101 and interest, as the balance due from the defendants to the plaintiffs under an agreement for payment by the defendants of \$607 in consideration of their being given the exclusive betting and gaming privileges at the race-meeting to take place on the track at Stratford on the 25th and 26th August, 1896. The plaintiffs were not an incorporated company, but no objection in that regard was taken at the trial. The plaintiffs were the lessees for 1896 of the Stratford Athletic Company, Limited, an incorporated association who owned the race-course. No evidence was adduced to show that illegal betting or gaming was in the contemplation of the parties to this agreement at the time it was made.

The defendants contended that the cause of action was in reference to a gaming transaction.

*Held*, that the betting or gaming to be carried on under the agreement would not necessarily be illegal under s. 204 of the Criminal Code, for the provisions of that section are not to extend to bets "made on the race-course of an incorporated association during the actual progress of a race-meeting," nor would it be necessarily illegal apart from this section. The betting and gaming contemplated by the agreement were to be made on the race-course of which the plaintiffs were the lessees during the actual progress of a race-meeting, and this was the race-course of an incorporated association, the Stratford Athletic Company, and it was not the less so, within the meaning of s. 204, by reason of the lease to the plaintiffs; the object of the Legislature apparently being to reserve the race-courses of incorporated associations as places where betting might be made during the actual progress of a race-meeting without the bettors being subject to the penalties of that section.

*Wallace Nesbitt*, for the defendants.

*Teetzel*, Q.C., for the plaintiffs.

[BOYD, C., 21ST OCTOBER, 1897.]

RICE v. TOWN OF WHITBY.

*Municipal corporations—Highways—Obstruction—Liability—Relief over.*

Where an object is left on the highway, which is calculated to frighten horses, and by which a horse is frightened, and an accident results, and where the municipality, though having notice, have taken no precautions to obviate danger by placing lights or stationing signalmen to warn travellers, the municipality is liable, in the absence of contributory negligence; but entitled to be indemnified by the person who placed the obstruction in the highway, and left it unguarded and unlighted.

*W. R. Riddell*, for the plaintiff.

*J. E. Farewell*, Q.C., for the defendants.

*C. J. Holman*, for the third party.

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[MEREDITH, C.J., 22ND OCTOBER, 1897.]

MUNRO v. WALLER.

*Damages—Measure of—Breach of covenant not to assign lease—Evidence.*

By the judgment in this action it was declared that the defendant, the assignee of a lease, had broken the covenant, contained in the lease, not to assign without leave, and a reference was directed to ascertain the damages to which the lessors were entitled by reason of such breach.

The referee found that the defendant at the time he assigned the lease was solvent and able to pay the rent as it would become due, and to perform the covenants for payment of taxes and insurance premiums, and that the person to whom the defendant assigned was insolvent, and without means, business, or credit; and he assessed the past damages at \$1,551.62, made up of the rent and taxes in arrear, and the future damages at \$2,346, made up by capitalizing all the accruing instalments of rent and future insurance premiums down to the expiration of the lease, and \$400 for damages for past breaches of the covenant to repair.

The evidence showed that the defendant, up to the time he assigned the lease, had paid the rent, though not punctually, and had, since he left the demised premises up to the time of judgment, paid his rent for the hotel to which he removed; but



the business carried on by him upon the demised premises had been deteriorating, and must soon have become an unprofitable one.

*Held*, upon appeal from the referee's report, that, while the plaintiffs were entitled to recover as damages such sum of money as would put them in the same position as if the covenant had not been broken and they had retained the liability of the defendant, instead of an inferior liability; yet, the damages assessed were excessive upon the evidence, and in estimating the value of the defendant's liability no allowance had been made for the vicissitudes of business and the uncertainty of life and health; and the damages were reduced to \$500.

*Williams v. Earle*, L. R. 8 Q. B. 751, followed.

*D. Urquhart*, for the defendant.

*C. Millar*, for the plaintiffs.

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[FERGUSON, J., 18th OCTOBER, 1897.]

### RAINVILLE v. GRAND TRUNK RAILWAY CO.

*Railways—Negligence—Fire caused by sparks from engine—Circumstantial evidence.*

Action for damages for negligence resulting in the burning of the plaintiff's property by sparks from an engine of the defendants. There was evidence that there was dry and inflammable material on the property of the defendant company, and that sparks or cinders from the engine might have fallen upon this and ignited it, and that fire might have thence spread or run to the plaintiff's property.

*Held*, that proof that the fire was communicated by sparks or cinders from the defendants' engine might be by circumstantial evidence, and there were here relevant circumstances, given in evidence, fit to be submitted to the jury; and motion for non-suit refused.

*M. K. Cowan*, for the plaintiff.

*Osler, Q.C.*, for the defendants.

[ROSE, J., 25TH SEPTEMBER, 1897.]

ATTORNEY-GENERAL v. CAMERON.

*Revenue—Succession Duty Act—55 V. c. 6—Final distribution—Duty payable.*

*Held*, in addition to the findings reported in 27 O. R. 880, 16 Occ. N. 198, the special case having been amended for the purpose of raising the question, that, under the Succession Duty Act, 55 V. c. 6, the duty payable on the capital was deferred until the final distribution thereof, and that the duty then payable would be on the amount then actually distributed, whether increased by accumulations, or by the rise in value of lands or securities, or decreased.

*J. R. Cartwright*, Q.C., for the Attorney-General.

*E. D. Armour*, Q.C., for the defendants.

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[STREET, J., 27TH OCTOBER, 1897.]

PATTERSON v. CENTRAL CANADA L. & S. CO.

*Waste—Tenant for life—Liability—Voluntary or permissive waste.*

Action for waste, brought by the plaintiffs as owners of the remainder in fee in certain lands, of which the defendants were tenants for the lives of one Patterson and his wife.

*Held*, that the defendants were liable only for voluntary and not for permissive waste.

*In re Cartwright*, 41 Ch. D. 582, followed.

*N. F. Davidson*, for the plaintiffs.

*D. W. Dumble*, for the defendants.

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IN CHAMBERS.

[MOSS, J. A., 1ST OCTOBER, 1897.]

GILPIN v. COLE.

*Costs—Taxation—Disbursements—Fee payable on taking mortgage account.*

Where, in a mortgage action, the defendant disputes the amount only of the plaintiff's claim, and no reference as to incumbrances is desired, the officer signing judgment is entitled for taking the account to no greater fee than that allowed by item 55 of Tariff B.

## OCCASIONAL NOTES.

[ROSE, J., 6TH OCTOBER, 1897.]

### GOFF v. STROHM.

*Will—Legacy—Vested interest—Period of payment.*

Where a testator gives a legatee an absolute vested interest in a defined fund, the Court will order payment on his attaining twenty-one, notwithstanding that by the terms of the will payment is postponed to a subsequent period.

*Rocke v. Rocke*, 9 Beav. 66, followed.

*H. M. Mowat*, for the applicant.

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[MACMAHON, J., 24TH AUGUST, 1897.]

### REGINA v. MURRAY.

*Criminal law—Procedure—Commitment for trial—Dies non juridicus—Subsequent trial—Validity—Court of record—Habeas corpus—Writ of error.*

The prisoner was on a statutory holiday committed for trial by a magistrate upon a charge of attempting to steal from the person, and on being brought before the County Court Judge, in compliance with s. 766 of the Criminal Code, 1892, consented to be tried by the Judge without a jury, and, being so tried, was convicted and sentenced to a term of imprisonment.

*Held*, upon the return to a writ of *habeas corpus*, that the fact that the prisoner was committed for trial and confined in gaol on a warrant that was a nullity could not affect the validity of the trial before the Judge under the Speedy Trials Act.

*D. O'Connell*, for the prisoner.

*A. M. Dymond*, for the Crown.

[Upon appeal, the Court of Appeal held that the County Court Judge's Criminal Court being a Court of record, its proceedings were not reviewable upon *habeas corpus*, but only upon writ of error].

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[MEREDITH, J., 22nd OCTOBER, 1897.]

### DIXON v. TRACEY.

*Parties—Causes of action—Joinder—Rule 185.*

Motion by the defendant to stay proceedings in the action until the plaintiffs should elect which of their causes of action they would proceed with.

The action was brought by a father and his daughter, as plaintiffs, to recover \$1,000 damages from the defendant, such claim being made generally on behalf of both plaintiffs. The statement of claim alleged the seduction of the daughter by the defendant and the breach by him of a promise to marry her. It also alleged that the defendant induced the daughter to allow an operation to be performed upon her person to procure an abortion, which resulted in severe bodily injury.

*Furlong*, for the defendant, contended that these causes of action could not be joined in one action.

*Masten*, for the plaintiffs, argued that by the new Rule 185 a change was made in the law, so that such cases as *Smurthwaite v. Hannay*, [1894] A. C. 494, and *Mooney v. Joyce*, 17 P. R. 241, were no longer applicable.

MEREDITH, J., held that Rule 185 did not permit of claim for seduction and breach of promise of marriage being joined in one action; and made the order asked by the defendant with costs to be costs in the action.

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## NEW BRUNSWICK.

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In the Supreme Court.

IN EQUITY.

[BARKER, J., 19TH OCTOBER, 1897.]

FERGUSON v. FERGUSON.

*Mortgage—Foreclosure—Mortgagee in possession—Reference to take accounts.*

Where, in a suit for the foreclosure of a mortgage and sale of the mortgaged premises, it appeared that the mortgagee had been in possession, the Court would not decree a sale on a motion to take the bill *pro confesso* for want of an appearance, without a reference being had to take the accounts.

*G. G. Gilbert*, Q.C., for the plaintiff.

[26TH OCTOBER, 1897.]

*In re TAYLOR.*

*Infant—Guardianship—Person—Estate—Testamentary guardian—  
Natural guardian.*

T. by his will bequeathed his estate to executors and trustees, with directions to convert it into money and invest it in safe interest-paying investments, and to set apart \$1,000 to be used by them for the purpose of educating and giving a profession to his son. He further directed them to use and apply the residue of his estate as follows:—One-half of the income thereof to be paid to his wife annually for her maintenance, while she remained his widow, and the other one-half to be used, as far as deemed necessary, for the maintenance and support of his son, and upon his arriving at the age of twenty-five years, one-half of all the estate, together with the accumulations on the same, to be given to him absolutely. The testator left him surviving only his wife and his son, an infant. The mother having applied to be appointed guardian of the infant:—

*Held*, that the executors and trustees were not testamentary guardians, and that the mother should be appointed guardian of the person of the infant, but not of his estate, as that was vested in the trustees.

*Pugsley*, Q.C., and *Ruel*, for the petitioner.

*Earle*, Q.C., and *C. J. Coster*, for the trustees.

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## IN CHAMBERS.

[BARKER, J., 22ND OCTOBER, 1897.]

*In re McNAUGHTON.*

*Administration—Application to put bond in suit—Prima facie case—Creditor residing abroad—Security for costs.*

In an application to put an administration bond in suit, the Court will not determine whether there has been a breach upon the bond. It is only necessary that the applicant make out a *prima facie* case.

Where the applicant is a creditor residing abroad, he will not be required to give security upon such application for the costs of action to be brought upon the bond.

*M. G. Teed*, for the applicant.

*W. B. Chandler*, for the bondsmen.

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## MANITOBA.

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In the Queen's Bench.

[TAYLOR, C.J., 5TH OCTOBER, 1897.]

### GREY v. MANITOBA AND NORTH-WESTERN R. W. CO.

*Judgment debtor—Examination of, abroad.*

The plaintiffs, as trustees, brought this action to recover moneys due to bondholders. After judgment had been recovered, the plaintiffs moved for an order directing the issue of a foreign commission for the examination in Montreal of A. Allan, of Montreal, the president, and H. M. Allan, of the same place, a member, of the board of the defendants, touching the names and residences of the stockholders of the company, etc., also as to any and what debts were owing to the company, and as to the estate and effects of the company, etc.

*Held*, that the application must be refused, but without costs. Looking at the wording of the Rules as to the examination of judgment debtors and of the officers of corporations which are judgment debtors, it was doubtful if an order could be made for an examination abroad. The officials before whom an examination can be taken being named seemed to indicate that an examination within the jurisdiction was what was intended.

*Wilson*, for the plaintiffs.

*Tupper*, Q.C., for the defendants.

## BELL v. McCALLUM.

*Breach of promise of marriage—Judgment by default—Assessment of damages—Jury.*

This was an action for breach of promise of marriage, and interlocutory judgment having been signed in default of defence, the record was entered for the assessment of damages by a Judge sitting on a Tuesday, under Rule 162.

Under s. 48 of the Queen's Bench Act, 1895, an action for breach of promise of marriage must be tried by a jury.

*Held*, that a Judge had no jurisdiction to try the action, the Act providing that it should be tried by a jury unless the parties in person, or by their solicitors or counsel, expressly waive such trial, and such trial not having been waived here.

As a Judge had no jurisdiction to try the cause of action, he had none to assess the damages.

*Howden*, for the plaintiff.

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[8TH OCTOBER, 1897.]

## ADAMS v. HOCKIN.

*Real Property Act—Non-compliance with requirements of Act—Insufficiency of description of property and of interest claimed by petitioner.*

Appeal by Hockin, the caveatee, from an order made by the referee directing the trial of an issue under the Real Property Act, upon the following grounds, among others :—

(1) That in the petition no address or description of the petitioner, the caveator, was given ; (2) That the petitioner did not state specifically what estate or interest he claimed ; (3) That the description of the property was indefinite, so that it could not be identified.

The petition was that of " Charles Adams." No address or description was given.

The petition contained a statement of facts on which the caveator relied, but it nowhere, as required by Rule 1 of Schedule R, stated specifically what estate, interest, or charge the caveator claimed.

The land was described as " lot 32 in block 15, as shown upon a plan of Oak Lake, being a subdivision of the north half of section 28 in township 9 and range 24, west of the princi-

pal meridian in the Province of Manitoba." It was not said by whom or when the plan was made, and it was not referred to or identified by any number, or as registered in any registry or land titles office. In the caveat the description of the land was the same.

*Held*, that the description of the property was vague and indefinite.

The Act required the petition to state specifically the estate, interest, or charge claimed by the caveator. The Act required the caveat to do so also, and when the caveat did not, it was held insufficient: *Jones v. Simpson*, 8 Man. L. R. 124; *McArthur v. Glass*, 6 Man. L. R. 224; *McKay v. Nanton*, 7 Man. L. R. 250.

The greatest accuracy and particularity are required in the proceedings, and the proceedings upon the present petition could not be upheld.

Appeal allowed with costs and petition dismissed with costs.

*Patterson*, for the caveatee.

*Clark*, for the caveator.

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## NORTH-WEST TERRITORIES

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In the Supreme Court.

NORTHERN ALBERTA JUDICIAL  
DISTRICT.

IN CHAMBERS.

[SCOTT, J., 28TH SEPTEMBER, 1897.]

*In re* ANGUS.

*Registry laws—Land Titles Act, 1894—Certificate of title—Memoranda as to incumbrances—Mortgages by strangers to the title—Improper registration—Mistake of Registrar—Cancellation of memoranda—Issue of new certificate.*

A reference by the Registrar of the South Alberta Land Registration District, under s. 112 of the Land Titles Act, 1894.



The applicants, R. B. Angus and others, were the owners of certain lands under certificate of title E. 245, dated 30th September, 1889. The folios of the register relating to these lands having become filled with memoranda, the applicants applied to the Registrar for the issue of a new certificate of title to such of the lands as to which their title had not been cancelled, free from all incumbrances not affecting their title. The Registrar thereupon issued to them certificate of title Y. 238, having indorsed upon it certain memoranda transcribed from certificate E. 245 to the effect that the title of the applicants to portions of the lands included in the certificate was subject to certain mortgages made by other persons, viz., E. M. Ellis and E. Pettit. The applicants objected to the issue of the certificate subject to these mortgages, and contended that the memoranda should not appear upon it. They applied to have the memoranda cancelled, or for the issue of a new certificate free from these incumbrances.

The questions submitted by the Registrar were: (1) Whether the instruments referred to or any of them were incumbrances upon the title of the applicants. (2) In the event of its being determined that they were not incumbrances, whether the Registrar should annul the registration by cancelling the memoranda, or issuing a new certificate of title, omitting them.

*J. B. Smith*, for the applicants.

The Registrar appeared in person.

*P. McCarthy*, Q.C., and *Jephson*, for the mortgagees, did not seek to oppose the applicants' claim to a clear certificate of title, so long as the covenants in the mortgage were not interfered with, and they neither opposed nor consented to the application.

*Scott, J.*—It appears by certificate E. 245 that at the time of its issue the applicants were the owners of the lands included in certificate Y. 238 free from all incumbrances. There is nothing on the register to show that E. M. Ellis and E. Pettit, or either of them, were then possessed of any estate or interest in the lands, or that they afterwards acquired any such estate or interest from the applicants or otherwise. They are in fact strangers to the title. Such being the case, I think there can be no doubt that they could not, under the provisions of the Territories Real Property Act or the Land Titles Act, 1894, create a mortgage upon the lands, and therefore that the mortgages executed by them should not have been registered.

After the issue of a certificate of title a mortgage can be made only by the registered owner or some person having a registered interest: Territories Real Property Act, ss. 3 (*f*), 60, 62, 76-81.

If a mortgage by other than the registered owner were authorized by the Act, it would follow that the mortgage must be entered on the register, and that under s. 60 the title of the registered owner would be subject to it.

The fact that the Registrar improperly received and entered upon the register documents purporting to be mortgages of the land would not constitute them mortgages under the Act.

I therefore hold that the instruments referred to are not incumbrances against the title of the registered owners.

That the Registrar has power to cancel a memorandum or indorsement upon the certificate of title which has been made in error, appears by s. 112 of the Land Titles Act, 1894.

As the instruments appear to have been entered upon the register by mistake, and as the parties interested under them have received notice of this reference, and have not shown cause to the contrary, I think the Registrar ought to correct the mistake by annulling the registration, either by cancelling the memoranda relating thereto, or by issuing a new certificate of title from which they should be omitted.

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## Supreme Court of Canada.

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EXCHEQUER COURT.]

[19TH OCTOBER, 1897.]

### BRADLEY v. THE QUEEN.

*Crown—Civil Service Act—Civil servant—Extra work—Remuneration.*

By s. 51 of the Civil Service Act, R. S. C. c. 17, no "extra salary or remuneration" can be paid to a member of the civil service unless the sum thereof has been placed in the estimates and authorized by a vote of Parliament or order in council. In an action by an official stenographer of the House of Commons to recover the price of services performed for the Crown outside the scope of his official services :—

*Held*, affirming the judgment of the Exchequer Court, *ante* 365, but for different reasons, that he was entitled to recover ; that the Civil Service Act applies to official stenographers ; but the words "extra salary or remuneration" in the Act refer only to the salary or remuneration paid to the civil servant for performance of his official duties, and not to payment for other services.

*Newcombe*, Q.C., for the appellant.

*W. D. Hogg*, Q.C., for the respondent.

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ONTARIO.]

[22ND OCTOBER, 1897.]

### CITY OF TORONTO v. TORONTO RAILWAY CO.

*Appeal—Assessment cases—Court for—Persons presiding—Appointment of—  
52 V. c. 37, s. 2 (D.)—55 V. c. 48 (O.)—58 V. c. 47 (O.)*

By the Supreme Court Amendment Act of 1889, 52 V. c. 37, s. 2, an appeal lies to the Court from the judgment of any Court of last resort created under Provincial legislation to adjudicate concerning the assessment of property for provincial

or municipal purposes in cases where the person or persons presiding over such Court is or are appointed by provincial or municipal authority.

By 55 V. c. 48 (O.), an appeal lies in a matter of assessment from the Court of Revision to the County Court Judge, and by 58 V. c. 47 (O.), two County Court Judges from adjoining counties may be associated with the Judge of the county in which the property assessed lies, for the hearing of such appeal. On appeal to the Supreme Court from the decision of the County Court Judges under this legislation :—

*Held*, KING, J., dissenting, that the persons presiding over the Court appealed from were appointed by federal authority, and the case was not within the amendment of 1889. The Court, therefore, had no jurisdiction to hear the appeal; and it was quashed with costs.

*Laidlaw*, Q.C., for the appellants.

*Robinson*, Q.C., for the respondents.

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[29TH OCTOBER, 1897.]

### BOURNE v. O'DONOHUE.

*Appeal—Judgment by default—Application to be let in to defend—Discretion—R. S. C. c. 135, s. 27—Final judgment.*

In an action in the High Court of Justice, by B. against O., judgment was entered for default of defence. O. applied to the Master in Chambers to have the judgment set aside and to be allowed to defend the action. This application was refused by the Master, and his refusal was affirmed on appeal to a Judge in Chambers, and on further appeals to a Divisional Court and the Court of Appeal: 17 P. R. 522, *ante* 277. From the decision of the Court of Appeal O. sought to appeal to the Supreme Court of Canada. On motion to quash his appeal :—

*Held*, that it was discretionary with the Master to grant or refuse the application to open up the proceedings in the action, and under s. 27 of the Supreme and Exchequer Courts Act, R. S. C. c. 135, no appeal could be taken to the Supreme Court of Canada from the decision on such application.

Quære, whether the judgment appealed from was a "final judgment," within the meaning of s. 24 (a) of the Act.

Appeal quashed with costs.

*Latchford*, for the motion.

The defendant, in person, *contra*.

QUEBEC.]

[12TH OCTOBER, 1897.

### DUROCHER v. DUROCHER.

*Judgment—Petition to set aside—Requête civile—Jurisdiction.*

Judgment on the appeal in this action was pronounced by the Supreme Court of Canada on the 1st May, 1897, dismissing the appeal with costs. In the following October term the appellant presented a *requête civile* asking that the judgment be set aside and the proceedings opened up, on the ground that since the judgment a deed had been discovered which had been fraudulently concealed by the respondent, and the judgment dismissing the appeal was therefore obtained by fraud.

*Held*, that the Court had no jurisdiction to grant the application; that it had power to annul errors in its own judgments, but not to interfere in a case of this kind; and the petition was refused with costs.

*Belcourt*, for the petitioner.

*Geoffrion*, Q.C., for the respondent.

BRITISH COLUMBIA.]

[22ND OCTOBER, 1897.

### UNION COLLIERY CO. v. ATTORNEY-GENERAL FOR BRITISH COLUMBIA.

*Appeal—Reference to Provincial Court for opinion—54 V. c. 5 (B. C.)*

By the Act of the British Columbia Legislature 54 V. c. 5, the Lieutenant-Governor in council may refer to the Supreme Court of the Province, or to a Divisional Court thereof, or to the full Court, any matter which he thinks fit so to refer, the opinion of the Court to be deemed a judgment of the Court, and an appeal to lie therefrom as in the case of a judgment in an action.

*Held*, on motion to quash, that no appeal lies to the Supreme Court of Canada from the opinion of the British Columbia Court on such a reference. If it was the intention of the Act to create such an appeal, it was beyond the powers of the Legislature of the Province; and the appeal was quashed without costs.

*Robinson*, Q.C., for the motion.

*W. D. Hogg*, Q.C., contra.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

DIVISIONAL COURT.]

[9TH NOVEMBER, 1897.

#### LELLIS v. LAMBERT.

*Husband and wife—Alienation of husband's affections—Adultery of husband—Damages—Married Women's Property Act, R. S. O. c. 132.*

Neither at common law, nor under the Married Women's Property Act, R. S. O. c. 132, will an action lie by a married woman against another woman to recover damages for alienation of her husband's affections, and for living in adultery with him.

*Quick v. Church*, 28 O. R. 262, overruled.

Judgment of a Divisional Court reversed.

*W. R. Smyth*, for the appellant.

*DuVernet*, for the respondent.

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#### ANDERSON v. GRAND TRUNK R. W. CO.

*Railways—Trespass—Passenger—Invitation—Negligence—Station—Evidence.*

The defendants were in the habit of selling tickets to, and allowing passengers to get off at, a crossing or junction, the only

means of egress to the highway being along the track. A passenger, while walking from the crossing to the highway, was killed.

*Held*, that he could not, under the circumstances, be looked upon as a trespasser; that the defendants were bound to use reasonable care towards him; and that, as there was some evidence of want of care, a verdict in favour of his representatives could not be interfered with.

Judgment of a Divisional Court, 27 O. R. 441, 16 Occ. N. 185, affirmed.

*Osler*, Q.C., for the appellants.

*Aylesworth*, Q.C., for the respondents.

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BOYD, C.]

BAKER v. FOREST CITY LODGE I. O. O. F.

PARKHOUSE v. DOMINION LODGE I. O. O. F.

*Benevolent societies—Alteration in rules—Reduction in amount of sick benefit.*

Appeals by the plaintiffs from the judgment of BOYD, C., 28 O. R. 238, were dismissed with costs, the Court agreeing with the reasons for judgment reported below.

*Hellmuth* and *W. C. Fitzgerald*, for the appellants.

*Shepley*, Q.C., and *R. K. Cowan*, for the respondents.

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ARMOUR, C.J.]

LINDSAY v. WALDBROOK.

*Will—Legacy—Abatement—Deficiency of assets.*

A testator directed that a farm should be sold, and that his executors should "first out of the said proceeds set apart the sum of \$2,000, and invest the same in some safe security, for the benefit of and for the maintenance and education of" the testator's grandson, subject to certain provisions as to payment of the income and corpus, and he then further directed that "out of the proceeds of the sale of the land there shall be paid the following legacies" to three daughters and a son of the testator.

*Held*, that the general rule of equality among legatees applied, and that, there not being sufficient to pay all the legacies in full, the grandson's legacy should abate proportionately.

Judgment of ARMOUR, C.J., reversed.

*C. J. Holman*, for the appellants.

*A. J. Boyd*, for the infant respondent.

*C. W. Colter*, for the adult respondent.

*Watson*, Q.C., for the executors.

MEREDITH, C.J.]

### BUILDING AND LOAN ASSOCIATION v. McKENZIE.

*Mortgage—Leasehold—Acquisition of reversion by mortgagor—Liability for payment of mortgage—Lien—Priorities.*

Where the assignee of a term, subject to a mortgage of the term and of the rights of renewal and of purchase given by the lease, exercises the right of purchase, the mortgage becomes a charge upon the fee, and the purchaser has no lien upon the fee in priority to the mortgage for the amount of the purchase money.

Judgment of MEREDITH, C.J., 28 O. R. 816, *ante* 84, affirmed.

*Laidlaw*, Q.C., and *D. W. Saunders*, for the appellant.

*H. J. Scott*, Q.C., and *A. Cassels*, for the respondents.

### McMICKING v. GIBBONS.

*Mortgage—Interest—Redemption—R. S. O. c. 111, s. 17.*

In an action of redemption by a second mortgagee against a first mortgagee, the latter is entitled to only six years' arrears of interest.

*Delaney v. Canadian Pacific R. W. Co.*, 21 O. R. 11, overruled on this point.

Judgment of MEREDITH, C.J., reversed.

*Garrow*, Q.C., for the appellant.

*Philip Holt*, for the respondent.



FERGUSON, J.]

HOLWELL v. TOWNSHIP OF WILMOT.

*Bankruptcy and insolvency—Assignments and preferences—Preference—  
Breach of trust—Revocation of transfer*

The transfer by the defaulting treasurer of a municipality to the bankers of the municipality of the accepted cheque of a third person for the amount due by him to the municipality cannot be impeached under the Assignments and Preferences Act, the duty to make good his wrong being sufficient to protect the transaction.

The cheque was sent by the treasurer in a letter to the bankers, and this letter was received by the bankers in the afternoon, but the amount was not credited in the bank books to the municipality till next morning, and before this was done an assignment for the benefit of creditors had been made by the treasurer.

*Held*, that the property passed as soon as the cheque reached the bankers, and that the assignment was not a revocation of the transfer.

Judgment of FERGUSON, J., affirmed.

*W. Nesbitt*, for the appellant.

*Aylesworth*, Q.C., for the respondents.

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CRAWFORD v. CANADA LIFE ASSURANCE COMPANY.

*Chose in action—Assignment—Notice—Life insurance.*

A life insurance company issued two policies upon a man's life, one policy being payable generally and the other to his wife. The assured made an assignment for the benefit of his creditors, and the assignee, who at the time knew only of the policy payable generally, wrote to the company referring to this policy by number and telling them of the assignment. The assured's wife had died before the assignment was made, and the policy in which she was named as beneficiary had become part of the assured's estate, and had passed to the assignee. A few weeks after notice of the assignment had been given to the company, the assured told them of his wife's death, and obtained from them the surrender value of the policy. There was no imputa-

tion of bad faith, and the officers of the company swore that they had at the time no recollection of notice of the assignment for the benefit of creditors having been given.

*Held*, that the company were entitled to distinct and clear notice of any change of interest, and were justified, in the absence of knowledge of the wife's death, in treating the notice of the assignment as applicable only to the policy payable generally, and not to that payable to the wife.

Judgment of FERGUSON, J., reversed.

*Bruce*, Q.C., for the appellants.

*S. H. Blake*, Q.C., and *Smythe*, Q.C., for the respondent.

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ROSE, J.]

#### HARRISON v. PRENTICE.

*Seduction—Presumption of service—Loss of service—Action—R. S. O. c. 58.*

The plaintiff's unmarried daughter was seduced by the defendant while at service in his family. There was no pregnancy, and only very slight physical disturbance:—

*Held*, that while there is under R. S. O. c. 58 a presumption of service, there is no presumption of loss of service, which must still be proved; and, MACLENNAN, J.A., dissenting, that proof of sickness or physical disturbance sufficient to have caused loss of service if the girl had been living with the parent, is not sufficient.

*Held*, also, per MACLENNAN, J.A., that an action for seduction will lie even if pregnancy does not result.

*Westacott v. Powell*, 2 E. & A. 525, and *Cole v. Hubble*, 26 O. R. 279, considered.

Judgment of ROSE, J., 28 O. R. 140, 16 Occ. N. 393, affirmed; MACLENNAN, J.A., dissenting.

*E. G. Porter*, for the appellant.

*W. B. Northrup*, for the respondent.

ROBERTSON, J.]

GROSS v. BRODRECHT.

*Evidence—Action for indecent assault—Evidence of reputation—Evidence of specific acts of impropriety.*

In an action for damages for indecent assault, evidence of the general reputation for unchastity of the plaintiff is admissible, but evidence of specific acts of impropriety is not.

Judgment of ROBERTSON, J., reversed.

*Idington*, Q.C., for the appellant.

*J. P. Mabee*, for the respondent.

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FALCONBRIDGE, J.]

BOULTON v. LANGMUIR.

*Bills and notes—Demand note—Alteration of date—Limitation of actions—Absence beyond the seas—Return from beyond the seas.*

The changing by the payee of the date of a demand note, payable with interest, to a later date, is a material alteration and makes it void, though the effect of the alteration may be to benefit the maker by reducing the amount of interest chargeable against him.

Judgment of FALCONBRIDGE, J., affirmed.

The expression “beyond the seas” in 4 & 5 Anne, c. 8 and c. 16, is not to be construed literally, but means, when applied to a defendant sued in this Province, “out of the Province of Ontario.”

To make the statute run in the defendant's favour, his return from beyond the seas must be open and of sufficiently long duration to have enabled the creditor, if he had known of it, to bring an action, though the creditor's knowledge is not essential.

*McCarthy*, Q.C., and *John MacGregor*, for the appellant.

*Aylesworth*, Q.C., and *E. B. Brown*, for the respondent.

MEREDITH, J.]

BUTCHART v. DOYLE.

*Landlord and tenant—Way—Mode of user.*

The defendant leased to the plaintiff a small knoll or island, standing in a shallow lake, which in the dry season became a muddy marsh. The land surrounding the knoll or island belonged to the defendant, and the lease provided that the plaintiff should have a right of way across it, nothing being said as to the mode of exercising the right. The plaintiff built a trestle bridge from the knoll or island to the main land, and this bridge the defendant pulled down.

*Held*, that the plaintiff's mode of user was reasonable, and that the defendant was not justified in interfering with the bridge.

Judgment of MEREDITH, J., reversed.

*Watson*, Q.C., and *Kilbourn*, for the appellant.

*Aylesworth*, Q.C., for the respondent.

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DRAINAGE REFEREE.]

*In re* TOWNSHIP OF CARADOC AND TOWNSHIP OF EKFRID.

*In re* TOWNSHIP OF METCALFE AND TOWNSHIP OF EKFRID.

*Drainage—Enlargement of drain—Work done beyond limits of initiating township—Error in mode of assessment—Drainage Act, 1894, 57 V. c. 56, s. 75.*

Under s. 75 of the Drainage Act, 1894, 57 V. c. 56, any municipality whose duty it is to maintain any part of a drainage work, may, without being set in motion by any complainant, initiate proceedings for its repair and improvement and for extending its outlet, although nearly the whole of the cost is assessable against adjoining townships.

Where, however, the engineer of the initiating township assessed lands in the adjoining townships for improved outlet, and the original outlet was in fact sufficient for these lands, his report was set aside; BURTON, C.J.O., dissenting.

*Per* BURTON, C.J.O.—A question of this kind should be dealt with by the Court of Revision, and where the engineer acts in good faith, his report cannot be set aside upon such a ground.

Judgment of the Drainage Referee reversed.

*Osler*, Q.C., and *T. G. Meredith*, for the appellants the township of Caradoc.

*Folinsbee*, for the appellants the township of Ekfrid.

*M. Wilson*, Q.C., and *J. B. Rankin*, for the respondents.

### IN CHAMBERS.

[MACLENNAN, J.A., 15TH OCTOBER, 1897.]

#### BOYD v. DOMINION COLD STORAGE CO.

*Security for costs—Court of Appeal—Special order—Judicature Act, 1895, s. 77—Foreign domicil—Company—Winding-up—Property in jurisdiction.*

Where the appellants were both domiciled out of Ontario, and one of them, an incorporated company, was in process of winding-up under R. S. C. c. 129 :—

*Held*, having regard to ss. 17, 89, and 66 of that Act, that the property of the company in Ontario was beyond the reach of the process of the Court ; and the circumstances were such that a special order for security for costs of the appeal should be made under Rule 1487 (808) of the 1st January, 1896, taken from s. 77 of the Judicature Act, 1895.

*Grant v. Banque Franco-Egyptienne*, 2 C. P. D. 430, and *Whittaker v. Kershaw*, 44 Ch. D. 296, followed.

*A. J. Boyd*, for the plaintiff.

*George Bell*, for the defendants.

[MOSS, J.A., 25TH OCTOBER, 1897.]

#### DENISON v. WOODS.

*Payment into Court—Defence—Payment out—Election—Time—Con. Rules 632 et seq.—Appeal—Removal of stay of proceedings.*

In an action to recover money for services rendered, the defendant pleaded that \$825 was more than an ample and

sufficient payment ; that he had before action paid the plaintiff \$25, and had always been ready and willing and was now ready and willing to pay him \$300 more ; that before action he had tendered \$800 in payment of the services rendered, but the plaintiff had refused to accept it ; and the defendant brought \$800 into Court in satisfaction of all claims and demands of the plaintiff in this action.

The plaintiff did not elect to take the money out of Court, but joined issue upon the defence, and, the action proceeding, was awarded \$897.50 by the report of a referee. After the defendant had unsuccessfully appealed from the report to the High Court, and had launched a further appeal to the Court of Appeal, the plaintiff applied to a Judge of the Court of Appeal for an order to remove the stay of proceedings in the Court below imposed by the giving of security, for the purpose of allowing him to move for payment out of Court of the \$300.

*Held*, that the defence was so framed that if the plaintiff had desired to take the money out of Court, he must have elected to do so before replying or before the expiration of the time for replying, as provided by Con. Rule 686, and must have taken it in satisfaction of all claims of the plaintiff in the action, and have filed and served a memorandum in accordance with Rule 685. But, as the plaintiff, instead of taking this course, proceeded with the action, the defendant was absolved from his offer, and the money remained in Court subject to further order ; the defendant was entitled, in the absence of special circumstances, to have it remain to be dealt with when the case should be finally disposed of ; and it was open to the defendant to contend that the amount allowed by the referee should be reduced below \$800, notwithstanding the payment into Court, by the plaintiff's election not to take the money out at the appropriate time.

And therefore the stay of proceedings should not be removed.

*Watson, Q.C.*, for the plaintiff.

*F. A. Anglin*, for the defendant.

## High Court of Justice.

[ARMOUR, C.J., STREET, J., 2ND NOVEMBER, 1897.]

*In re* SHERLOCK.

*Will—Legacy—Specific amount—Specific source—Larger amount from specific source.*

An appeal by legatees under a will from an order of MEREDITH, C.J., made upon a petition for the advice of the Court under R. S. O. c. 110 as to the disposition of certain moneys of the estate. The bequest was as follows: "The £290 due from the Edwards estate in England . . . to be equally divided among the daughters of Samuel Langford Sherlock." The amount due from the Edwards estate was in fact £2,900. MEREDITH, C.J., made an order declaring that the bequest operated upon and passed the whole of the Edwards debt.

*Held*, reversing this order, that there was no gift which could properly be treated as a gift of the debt due from the Edwards estate irrespective of the amount. It would be unsafe and contrary to rule to speculate as to what the testatrix would have done had she known the true amount due to her to be ten times what she supposed it to be, and, as she did not give "the debt," in terms, but only a sum of money, in terms, the Court was bound to read the will as giving the sum of money named and not the whole debt of which it formed part.

*Smith v. Fitzgerald*, 3 V. & B. 2; *Hotham v. Sutton*, 15 Ves. 819; *Horwood v. Griffith*, 4 D. M. & G. 700; *Loring v. Loring*, 12 Gr. 874, referred to.

*S. Price*, for the appellants.

*McBrayne*, for the respondents.

[BOYD, C., 8TH NOVEMBER, 1897.]

ARMOUR v. KILMER.

*Costs—Counsel fees—Action by counsel against solicitors—Privity between counsel and client—Supreme Court of Canada—Costs between solicitor and client.*

Action by a barrister against a firm of solicitors for counsel fees. The items in dispute were in respect of an appeal to the

Supreme Court of Canada in *Jamieson v. London and Canadian L. & A. Co.*, in which the plaintiff was retained as counsel by the defendants, who were solicitors for the plaintiff in that action. The plaintiff was paid the fees taxed between party and party in the action, but claimed a larger sum.

*Held*, that the present law of Ontario, in contrast with that of England, permits counsel to sue client for the value of professional services.

*Kennedy v. Broun*, 18 C. B. N. S. 677 ; *Doe v. Hale*, 15 Q. B. 171 ; *Mostyn v. Mostyn*, L. R. 5 Ch. 457 ; *McDougall v. Campbell*, 41 U. C. R. 849 ; and *Doutre v. The Queen*, 9 App. Cas. 745, referred to.

There is no provision in the procedure of the Supreme Court of Canada for the ascertainment of costs between solicitor and client.

*Boak v. Merchants' Union Ins. Co.*, Cassels' Dig., p. 357, No. 85 ; *Paradis v. Bossé*, 21 S. C. R. 419 ; *Poucher v. Norman*, 8 B. & C. 745, referred to.

The solicitor retained the plaintiff in the interests of the client to prosecute the appeal before the Supreme Court. This was with the direct knowledge and sanction of the client, with whom the counsel had interviews touching the appeal. There was no evidence of any agreement beyond what arises from implication, and there was no evidence of any money being in the hands of the solicitor to answer this claim.

*Held*, again contrary to the English rule, that solicitors who employ counsel have implied authority to pledge the client's credit for the payment of counsel fees, and legal privity exists between client and counsel, though a solicitor has intervened in the usual way. This arises from the general authority which the retainer from client to solicitor imports to do all that needs to be done for the proper and effective conduct of litigation. There was no personal liability brought home to the defendants to pay these fees.

*Hobart v. Butler*, 9 Ir. C. L. at pp. 165-6 ; *Scrace v. Whittington*, 2 B. & C. 11 ; *Robins v. Bridge*, 8 M. & W. 114 ; *Lee v. Everest*, 2 H. & N. 285 ; *Johnson v. Ogilby*, 8 P. Wms. 277 ; *Brigham v. Foster*, 11 Allen (Mass.) 419 ; *Miller v. McCarthy*, 27 C. P. 147 ; *Gordon v. Adams*, 43 U. C. R. 207 ; *Re Broad*, 15 Q. B. D. 420, referred to.



The action was dismissed without costs.

*H. W. Mickle*, for the plaintiff.

*G. G. S. Lindsey*, for the defendants.

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[ROSE, J., 8TH NOVEMBER, 1897.]

HANNUM v. McRAE.

*Contempt of Court—Witness—Reference—Subpœna—Rule 484—Local manager of bank—Principal officers resident outside the Province—Production of bank books—Disclosure of bank accounts.*

Motion by the plaintiff to commit the local manager of a chartered bank, who was subpoenaed to attend before a Master upon a reference and there to produce the books of the bank and give evidence, for his contempt in not producing the books and refusing to answer certain questions.

*Held*, that a subpoena may properly be issued to compel the attendance of a witness before a Master, who has jurisdiction by Rule 484.

2. That it was unreasonable to expect the witness to take from the bank the books that were in use and attend during banking hours for the purpose of an examination in a matter in which he had no interest except as a witness; and it would therefore be proper for the Master to take the evidence at the banking offices, after banking hours.

3. That where the head office of a bank is outside of the Province, and the president, directors, and general manager are outside of it, the local manager is the person in charge and custody of the books, and is the proper person to subpoena to produce them. And he should be ordered to produce them for the purpose of evidence, more especially where it does not appear that in so doing he will be contravening any rule or regulation of the bank.

*Re Dwight and Macklam*, 15 O. R. 148, followed. *Crowther v. Appleby*, L. R. 9 C. P. 23, and *Attorney-General v. Wilson*, 9 Sim. 926, distinguished.

4. That the witness's objection to produce the books, because the bank was precluded by law from exhibiting to any one or permitting any one to inspect the account of any person

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*CANADIAN LAW TIMES.*  
 dealing with the bank, was untenable, the evidence sought  
 being as a person engaged in financial transactions in which a  
 person was engaged, his representatives desiring to  
 know what moneys the bank received and what disposition was  
 made of them, and all parties interested being willing that the  
 evidence should be given.  
*P. R. Letchford, for the plaintiff.*  
*Therers Lewis, for the witness.*

[STREET, J., 1ST NOVEMBER, 1897.]

*In re* McCAULEY.

*Will—Devise—Charitable use—Gift to a bishop in trust for his diocese.*

*Petition by the Bishop of the Roman Catholic Diocese of London.*

A testator by his will devised certain lands to the petitioner in the following words: "To Dennis O'Connor, of London, Ontario, his successors and heirs, and in trust for the use of the Catholic Diocese of London, I give and devise my real estate, etc., and I request the said bishop and his successors to remember me in prayer at the altar of the cathedral of said diocese." The will was dated 8rd August, 1894, and the testator died in September, 1894. By s. 8 of the Mortmain and Charitable Uses Act, 1892, land devised "to or for the benefit of any charitable use" is required to be sold within two years from the death of the testator, and, in default of the sale within that period, is vested by s. 5 of the Act in the accountant of the Supreme Court of Judicature for Ontario, and is to be sold under the direction of the High Court for the benefit of the charity. The petition presented prayed to have a contract of sale which he had made carried out by the Court.

*Held*, that a devise to a bishop in trust simply for his diocese is not a devise to a "charitable use" within the decisions defining that term. A devise direct to the diocese would certainly not be a devise to a charitable use, and a devise to a bishop in trust does not help the matter. There must be a direction or trust in the devise for the application of the proceeds to some one or more of the numerous objects which come within the definition of charities as settled by the decisions. Many, but not all, of the objects to which the funds of a diocese

are usually devoted may be charitable within the meaning of the Act, but there is nothing in this devise requiring the gift to be devoted to any particular one or more of those objects, and so it is not a gift to a charitable use.

*P. Mulkern*, for the petitioner.

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[MEREDITH, J., 11TH NOVEMBER, 1897.]

### MACDONALD v. CITY OF TORONTO.

*Municipal corporations—Appointment of officers—Assessment commissioner—Acceptance of office by mayor before resignation—Appointment after resignation.*

Action by Ernest Albert Macdonald against the corporation of the city of Toronto and Robert J. Fleming, for a declaration that a certain contract between the defendants and the appointment of the defendant Fleming as assessment commissioner for the city of Toronto, pursuant thereto, were illegal and void, and for an injunction restraining the corporation from further employing Fleming under the appointment, and from paying over to him any of the funds of the corporation for his services as assessment commissioner, upon the ground that his appointment to that office was procured by corrupt and illegal means, whilst he held the office of mayor of the city of Toronto, and by an unlawful scheme, contrivance, and conspiracy. At the close of the trial it was admitted that the plaintiff had failed to prove these grounds of his attack.

*DuVernet* and *Bradford*, for the plaintiff, contended that the rule of equity, that a trustee shall not make a profit out of his office, applied to the defendant Fleming, and therefore he could not rightly hold the office; or, in other words, that all members of the council were, and the mayor especially was, ineligible for appointment to any office of profit in the gift of the council.

*Fullerton*, Q.C., and *W. C. Chisholm*, for the defendants.

MEREDITH, J.—The defendant Fleming had, in the manner provided by the Municipal Act, ceased to be mayor before being duly appointed assessment commissioner. After he had vacated the office of mayor, the council would have been within its legal

rights in appointing some other person to the office of assessment commissioner, as it is its right, at any time, to remove him from it. I am unable to consider that the defendant Fleming was disqualified for the office, because (as I find as facts) he desired the office, and endeavoured to obtain a salary of \$5,000 a year, and was offered and accepted the office at \$4,000 a year, before vacating his office of mayor. A man is not to be disqualified always because he has once been a member of the council; the line must be drawn somewhere, and in my judgment can be rightly drawn only at the time of appointment to and acceptance of the office. No authority to the contrary was cited, and such cases as I have been able to find bearing upon the question tend to support the view I have expressed. (Reference to *Stainland v. Hopkins*, 9 M. & W. 178, and *Regina v. Tizard*, 9 B. & C. 418.)

The Municipal Act provides that the council shall not appoint as assessor a member of the council, and also disqualifies assessors from being members of the council; but that does not prevent the appointment of one who has been, however recently, but has ceased to be, such a member; in effect, it prevents one person holding the two offices, as probably the law, if there had been no enactment affecting the question, would have prevented it, as being incompatible offices: see *Regina v. White*, L. R. 2 Q. B. 157.

Action dismissed with costs.

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#### IN CHAMBERS.

[MEREDITH, C.J., 15TH NOVEMBER, 1897.]

*In re* BERRYMAN.

*Infant—Insurance money—Payment into Court—Right of foreign tutrix to payment out—Appointment as trustee—R. S. O. c. 136, ss. 11, 12, 14, 15.*

An application by the tutrix of two infants, appointed by the Superior Court of St. Francis, in the Province of Quebec, for payment to her of a fund of about \$1,000, paid into Court by the Sons of England Benefit Society under an order made under s. 15 of R. S. O. c. 136, an Act to secure to wives and children the benefit of life insurance.

By the law of Quebec the tutrix is entitled to demand and receive all the personal estate of the infants of whom she is tutrix, wherever the same may be, and it is her duty to reduce into her possession all such personal property, and, according to *Hanrahan v. Hanrahan*, 19 O. R. 396, these rights must be recognized in this Province.

*Held*, that the provisions of ss. 11, 12, 14, and 15 of the Act above mentioned provide a special mode for dealing with the shares of infants in insurance moneys, and exclude the application of the ordinary rules of law, so far as they are inconsistent with these provisions.

The motion was refused, but it was intimated that an order might go appointing the applicant trustee of the fund under s. 12, and directing payment to her as such trustee, upon her giving security for the faithful performance of her duty as trustee and for the proper application of the fund.

*W. E. Middleton*, for the applicant.

*F. W. Harcourt*, for the official guardian.

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[19TH NOVEMBER, 1897.]

### GALLAGHER v. GALLAGHER.

*Costs—Alimony—Disbursements—Prospective counsel fee—Solicitor as counsel—Rule 1144.*

Rule 1144 does not warrant the making of an order for payment by defendant to plaintiff's solicitors in an alimony action, of a sum to cover counsel fees, unless it is shown that the fees are to be paid to counsel who is not the solicitor for the plaintiff or the partner of the solicitor.

*W. E. Middleton*, for the plaintiff.

*J. Bicknell*, for the defendant.

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[ROSE, J., 23RD SEPTEMBER, 1897.]

### *In re* REGINA v. McINTOSH.

*Prohibition—Judge of County Court—Order for costs—Appeal to Sessions—Summary conviction under 52 V. c. 43 (D.)—Criminal Code, ss. 879, 880.*

Motion by the defendant for an order prohibiting the Judge of the County Court of Middlesex and others from proceeding to

enforce an order of such Judge whereby the costs of a certain appeal to the Sessions from a summary conviction were fixed at \$66.89 and ordered to be paid by the defendant to the clerk of the peace, together with the costs of the Court below. The motion was made on the ground that, as no provision was made by 52 V. c. 43 (D.), an Act to provide against frauds in the supplying of milk, etc., under which Act the conviction was made and the appeal taken, for the payment of costs, there was no jurisdiction in the Judge to award costs or to fix them.

*Held*, that under 52 V. c. 43, s. 9, the Judge had the same power to award costs as the Sessions of the Peace under ss. 879 and 880 of the Criminal Code; and under s. 880 (c) the Judge, upon an appeal, could award such costs, including solicitors' fees, as he deemed proper; and there was no power in the High Court to review his discretion.

*Aylesworth*, Q.C., for the defendant.

*Shepley*, Q.C., for the complainant.

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## NEW BRUNSWICK.

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In the Supreme Court.

IN EQUITY.

[BARKER, J., 16TH NOVEMBER, 1897.]

BRASS v. CONNORS.

*Leave to file bill—Time—Ex parte application—53 V. c. 4, s. 22.*

A plaintiff will not be allowed to file his bill after the time provided by s. 22 of 53 V. c. 4, without notice to the defendant, though the defendant has not appeared, and the delay in filing the bill was due to negotiations being made for a settlement.

*R. G. Murray*, for the plaintiff.

## MANITOBA.

## In the Queen's Bench.

[BAIN, J., 28TH OCTOBER, 1897.]

## MASSEY-HARRIS CO. v. WARENER.

*Execution—Exemptions—Homestead of debtor conveyed to his wife—Conveyance fraudulent—Lands not exempt—Title not in debtor.*

Appeal from an order of the referee. The plaintiffs, on the 4th of December, 1893, recovered a judgment against the defendant, which was registered in the Land Titles Office in July, 1896. The defendant, on the 11th August, 1896, became entitled as a homesteader to a patent for a quarter section, but on the 30th September he signed a quit-claim deed in favour of his wife, in consequence of which the patent issued in the wife's name. At the time of the transfer the husband was insolvent. The transfer was given without consideration and for the purpose of protecting the husband against his creditors, the wife claiming no interest in the land other than as trustee for her husband.

The plaintiffs asked for an order under Rule 803 directing a sale of the lands to satisfy their judgment.

The defendant admitted that the judgment was a charge on the lands, but claimed they were exempt from sale, under the Judgments Act, R. S. M. c. 80, s. 12 (a), which provides that no proceedings shall be taken under any registered judgment against "the land upon which the judgment debtor or his family actually resides, or which he cultivates either wholly or in part." As the defendant and his family had been living on and cultivating the land ever since he took it up as a homestead, the referee was of opinion that it was exempt from sale, although it did not belong to him, and he dismissed the application with costs.

The plaintiffs appealed.

The appeal was allowed with costs, the order of the referee set aside, and an order made for sale of the lands with costs.

*Held*, that it might be assumed from the evidence that the conveyance from the defendant to his wife was fraudulent and void as against creditors. Still such a conveyance is not void but voidable ; it is good as between the parties to it, and so, as between the defendant and his wife, the title of the lands was in her and he had no interest in them.

The intention is manifest that the lands that are to be exempt from sale under s. 12 of the Act are the same kind of lands that are dealt with in the preceding sections, *i.e.*, lands that belong to the judgment debtor himself, and that would be bound by the registration of a judgment against him at the time the exemption is claimed. The case of a man claiming as his exemption, land that does not belong to him and in which he has no interest, is one that is altogether outside the scope and intention of the statute.

*Culver*, Q.C., for the plaintiffs.

*Metcalfe*, for the defendant.

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## Supreme Court of Canada.

NOVA SCOTIA.]

[10TH NOVEMBER, 1897.]

### KNOCK v. KNOCK.

*Way—Easement—Winter road—Appurtenant way—Necessary way—Implied grant—Landlocked tenement—User—Evidence of—Prescription—Discontinuous user—Contentious user—Obstruction—Interruption of prescription—Acquiescence—Limitation of actions.*

K. owned lands in the county of Lunenburg, N.S., over which he had for years utilized a roadway for convenient purposes. After his death, the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his house at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means the plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There did not appear to be any defined form of the way across the lands more than a track upon the snow, during the winter months, and it was not utilized at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it and was allowed to remain undisturbed, and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff.

By R. S. N. S., 5th ser., c. 112, a limitation of twenty years is provided for the acquisition of easements, and it is declared that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same.

*Held*, that, notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute.

*Held*, also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was a necessary easement appurtenant or appendant to the land formerly held in unity of possession, which would pass by implication upon the severance of the tenements, without special grant.

*Wade*, Q.C., for the appellant.

*Harrington*, Q.C., for the respondent.

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### IN CHAMBERS.

[GIROUARD, J., 31ST DECEMBER, 1896.]

### REGINA v. MACDONALD.

*Canada Temperance Act—Summary conviction—Stipendiary magistrate—Territorial jurisdiction—Warrant of commitment—Statute defining municipalities—Judicial notice—Habeas corpus—Jurisdiction of Supreme Court of Canada—R. S. C. c. 135, s. 32.*

A warrant of commitment was made by the stipendiary magistrate for the police division of the municipality of the county of Pictou, in Nova Scotia, upon a summary conviction for an offence against the Canada Temperance Act, therein stated to have been committed "at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent than the municipality of the county of Pictou, there being also four incorporated towns within the county limits; and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1895 respecting county corporations, 58 V. c. 8, contains a schedule which mentions Hopewell as a polling district in Pictou county, entitled to return two councillors to the county council. See 29 N. S. Reps. 160, *ante* 61.

*Held*, that the Court was bound to take judicial notice of the territorial divisions declared by the statute, as establishing that the place of offence mentioned was within the territorial extent of the police division.

*Held*, also, that the jurisdiction of a Judge of the Supreme Court of Canada in matters of *habeas corpus* in criminal cases is limited to an inquiry into the cause of imprisonment, as disclosed by the warrant of commitment : R. S. C. c. 135, s. 32.

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## ONTARIO.

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### Supreme Court of Judicature.

### COURT OF APPEAL.

DIVISIONAL COURT.]

[20TH OCTOBER, 1897.

#### PAYNE v. CAUGHELL.

*Way—Toll road—Municipal corporation—Power to lease toll road to individual—Tolls—16 V. c. 190, s. 26 — Practice — Appeal — Divisional Court.*

Under s. 26 of 16 V. c. 190, a municipal corporation to which, under 12 V. c. 5, s. 12, a toll road has been transferred by the Governor-in-Council, has power to lease the road to an individual, who may exact tolls for the use thereof. The right is not limited to leases to toll road companies.

Judgment of a Divisional Court, 28 O. R. 157, 16 Occ. N. 891, reversed.

Where, pursuant to 12 V. c. 5, s. 12, the Governor-in-Council has transferred to a municipal corporation a toll road upon which certain rates of toll are in force, with the right to alter or vary the rates of toll, it can increase the rates of toll to any sum not exceeding the maximum mentioned in Schedule A to 12 V. c. 4, and the lessee can exact payment of the increased rates, and is not limited to a toll sufficient to keep the road in repair.

Where the Judge presiding at the trial of an action directs it to stand over to have parties added, and both parties apply to a Divisional Court to set aside this direction, and, by consent and without prejudice to the right of appeal, ask the Divisional Court to hear the case on the merits, either party may, without leave, appeal to the Court of Appeal for Ontario from the judgment of the Divisional Court.

*Robinson, Q.C., and Meek, for the appellants.*

*J. A. McLean and W. K. Cameron, for the respondent.*

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## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 20TH NOVEMBER, 1897.]

### EASTWOOD v. HENDERSON.

*Costs—Libel—Apology—Satisfaction—Trial of question of costs—Application at Chambers.*

After action for libel brought, the defendants published a retraction and apology, which was accepted as satisfactory by the plaintiff. The defendants declined to pay the plaintiff's costs up to that time, and the plaintiff proceeded to trial.

*Held*, MEREDITH, C.J., dissenting, that either party could, after the publication of the apology and its acceptance by the plaintiff, have moved in Chambers to have the question of costs disposed of; but, neither party having moved, that the plaintiff should have such costs only as he would have been entitled to had he so moved, and that the defendants should have no costs.

*Knickerbocker v. Ratz*, 16 P. R. 191, followed.

Judgment of ARMOUR, C.J., varied.

*Wallace Nesbitt and R. L. Johnston, for the plaintiff.*

*Farewell, Q.C., for the defendants.*

[ARMOUR, C.J., FALCONBRIDGE, J., 7TH DECEMBER, 1897.]

*In re* DUNN v. GOURLAY.

*Mandamus—Prohibition—Division Court—Territorial jurisdiction—Cause of action—Contract—Where made.*

An appeal by the plaintiff from an order of ROBERTSON, J., in Chambers, dismissing a motion by the plaintiff for a mandamus to the Judge of the County Court of Peterborough to command him to try this action in the 1st Division Court in that county, and for a prohibition to the second junior Judge of the County Court of York to prohibit him from trying the action in the 1st Division Court in that county. The action was brought at Peterborough, where the plaintiff lived, against a firm of piano-dealers carrying on business at Toronto, to recover commissions on the sale of pianos, in pursuance of a written contract, which was signed by the defendants at Toronto, and then sent to the plaintiff, who signed it at Peterborough. Upon the defendants' application, the Judge at Peterborough made an order transferring the action to Toronto.

*O'Connell*, for the plaintiff, contended that the whole cause of action arose at Peterborough ; the breach was there, and the contract was made there, because until signed by the plaintiff it was no contract at all.

*H. Cassels*, for the defendants, contra.

The Court held that the cause of action did not wholly arise at Peterborough, and that the Judge was right in transferring the action to Toronto, where the defendants carried on business.

Appeal dismissed with costs.

[BOYD, C., 1ST NOVEMBER, 1897.]

RADAM v. SHAW.

*Trade-mark—Fancy name—Validity of—Injunction.*

The words "Microbe-Killer" constitute a valid trade-mark which is within the class of fancy names used to distinguish one article from another by the maker or inventor. And an

injunction was granted at the instance of the owner of such registered trade-mark to restrain its use by another.

*Davis v. Kennedy*, 18 Gr. 528, followed.

*J. R. Roaf* and *W. Nesbitt*, for the plaintiff.

*L. V. McBrady*, for the defendant.

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[22ND NOVEMBER, 1897.]

### STEWART v. MILLAR.

*Bankruptcy and insolvency—Assignee for benefit of creditors—Action against, for account—Assignee's compensation—Payments to inspectors—Solicitor's bill.*

An action brought by J. A. Stewart, on behalf of himself and all other creditors of William Southcott, an insolvent, against James Millar, assignee under R. S. O. c. 124 of the estate of William Southcott, to compel the defendant to carry out the trusts of the deed of assignment and to compel the winding-up of the insolvent estate under the advice and direction of the Court.

*Held*, as to the compensation of the assignee, the amount received by him being only \$46, that if the plaintiff was dissatisfied with this, his proper course, as pointed out in s. 11 (2) of R. S. O. c. 124, was to apply in a summary way to the Judge of the County Court to have it reviewed and readjusted; but it should not be made the subject of litigation in the High Court.

2. As to the amount paid to the three inspectors, \$60, that appeared to be an unauthorized payment. No travelling expenses were incurred, and under s. 11 (3) no other allowance is to be made to the inspectors except upon a resolution of the creditors; there was no such resolution; and, although steps might yet be taken to legalize what had been done, the defendant had not at present properly accounted for this disbursement. Unless the body of creditors should, at a proper meeting, ratify what had been done, or in so far as they should fail to do so, the defendant would have to account for this item.

3. As to the solicitor's bill, there was no need to bring an action, as the solicitor was subject to the summary jurisdiction

of the Court, of which he was an officer, and liable to have his bill taxed ; and the proper course was to apply for taxation.

*R. H. Collins*, for the plaintiff.

*Philip Holt*, for the defendant.

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[MEREDITH, C.J., 26TH NOVEMBER, 1897.]

*In re* CASSIDY AND TOWNSHIP OF MOUNTAIN.

*Municipal corporations—Drainage—Petition—Changes and interlineations—Uncertainty as to drainage area—Report of engineer—Cost of maintenance—Uncertainty as to lands charged with rate—Description.*

Application by James Cassidy and James Shaw to quash by-law No. 172 of the township of Mountain, passed 15th February, 1897, being a by-law to provide for drainage works in the townships of Mountain and Winchester and the village of Winchester, in the county of Dundas, and in the township of Russell, in the county of Russell, and for borrowing on the credit of the municipality \$23,078.88, the proportion to be contributed by the municipality for completing the same.

The by-law was assumed to be passed under the authority of the Drainage Act, 1894, and was based on the petition of certain of the assessed owners of the lands in the 6th, 7th, 8th, and 9th concessions of the township, who applied for the drainage of an area in these concessions of not more than 1,900 acres, exclusive of roads.

By the report of the engineer, a scheme involving the construction of a drain extending from the drainage area through the township of Winchester and the village of Winchester, and into, and through part of, the township of Russell, to lot 5 in the 3rd concession of that township, at a cost of \$46,252.89, was recommended, and an assessment was made upon the lands and roads in the four municipalities to cover the amount of the suggested expenditure. The lands so assessed included many thousands of acres not embraced within the drainage area, and all of the lands not so embraced were assessed for outlet liability only, the drainage area being assessed for benefit only. Out of the whole sum to be assessed against lands and roads in the township of Mountain, but \$6,790 was assessed against the lands and roads within the drainage area, while no less than

\$17,546 was assessed against lands and roads not within the drainage area.

No less than three, if not four, of the petitioners were marksmen, and there was no attestation of their signatures; it was difficult to understand whether Patrick McMahon and Felix Lamourey signed as petitioners, or the one as witness to the signature of the other, and if the latter, which was witness and which petitioner.

The petition, as originally drawn, included the whole of lot 10 in the 6th concession, and the whole of lot 18 in the 8th concession, in the drainage area; but, as the petition appeared upon the motion, the words "east half" were interlined before "10," and there was the appearance of a line drawn diagonally through these figures, and the words "east half" were interlined before "18," and there was no evidence as to when or by whom these interlineations were made and the line was drawn, except an affidavit that the petition as it appeared upon the motion was in the same condition as it was in when presented to the council.

*Held*, that there was no presumption of law as to when these changes were made, but, even if it should be assumed that they were made before any signatures were appended to the petition or assented to by those who had signed before they were made, it would still be doubtful whether the petition was to be read as including the east half of lot 10, or as excluding lot 10 altogether, and including only the east half of lot 11 in the 6th concession; and it was not clear whether, if the words "east half" interlined before "18" were to be read into the petition, they did not apply to all the lots in the 8th concession the numbers of which were mentioned. And, in view of these circumstances and considerations, a by-law for incurring so large an expenditure and imposing six-sevenths of the burden of it on lands and roads the owners of which did not petition for the work, and many of whom were opposed to its being undertaken, based upon such a petition, ought to be quashed. How was it possible to ascertain whether a foundation for the by-law had been provided, where the petition was uncertain as to the lands intended to be embraced within the drainage area?

*Held*, also, that the report of the engineer was insufficient to warrant the passing of the by-law, as it omitted all reference



to the cost of maintenance, and the proportions in which that cost was to be borne. Sections 14 and 69 of the Act referred to. And this objection also was fatal to the by-law.

*Held*, also, that the by-law was uncertain as to the lands charged with the rate, following in that respect the assessment of the engineer. Many of the parcels assessed were described as "part" of a lot, with no other description than "east" or the like, and a statement of the number of acres; and such a description was uncertain and insufficient. Other parcels were described merely as part of the lot, with the number of acres or other quantity of land contained in them. This was an objection which the applicants were entitled to put forward as invalidating the by-law.

Order made quashing the by-law with costs.

*Langton, Q.C.*, and *H. M. Mowat*, for the applicants.

*Clute, Q.C.*, for the township corporation.

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[FERGUSON, J., 29TH OCTOBER, 1897.]

*In re SAYLOR.*

*Infants—Insurance moneys—Foreign guardian—Trustee to receive infants' shares—Appointment—Security—60 V. c. 86, s. 156 (5).*

A policy issued by the Canada Life Assurance Company, upon the life of one Alfred H. Saylor, named as beneficiaries the wife and infant children of the assured, who died intestate without appointing a trustee to receive the infants' shares. The company admitted the claim upon the policy. Upon an application for the appointment of a trustee, it appeared by the certificate of the Judge of a Court in the State of Ohio that the infants' mother had been appointed their guardian by such Court; that the infants and their mother resided within its jurisdiction; and that security, in accordance with the practice of that Court, had been given in respect of and for the due application and account of the money payable under the policy.

*Held*, that there had been a substantial compliance with the provisions of 60 V. c. 86, s. 156 (5); and the guardian was appointed trustee, and security was dispensed with.

*W. F. Burton*, for the company and the petitioners.

*In re* PONTON.

*Infants—Insurance moneys—Trustee to receive infants' shares—Appointment of foreigner—Security—60 V. c. 86, s. 155 (2).*

A policy issued by the Canada Life Assurance Company upon the life of one Edward George Ponton had been declared by the assured in his lifetime to be a policy in favour of his wife and children. At the time of his death his children were infants. He had not appointed a trustee to receive their shares of the insurance money. The infants resided with their mother in the State of New York. The company admitted the claim upon the policy.

Upon an application made on behalf of the infants and their mother, with the approval of the official guardian, an order was made appointing E. P. Hannaford, a resident of the Province of Quebec, trustee under 60 V. c. 86, s. 155 (2), to receive the shares of the infants, upon his giving security within this Province to the satisfaction of the Registrar.

*W. F. Burton*, for the company and the petitioners.

*F. W. Harcourt*, for the official guardian.

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[29TH NOVEMBER, 1897.]

*In re* NORRIS.

*Assessment and taxes—Vacant tenement—Remission of taxes—Petition—Court of Revision—55 V. c. 48, s. 67—Mandamus.*

A motion on behalf of the estate of James Norris and of the Canadian Bank of Commerce, for an order in the nature of a mandamus to the Court of Revision for the city of St. Catharines to entertain and hear a petition of the applicants. The applicants were the owners of two separate properties in the city of St. Catharines, called "Mill A." and "Mill B.," which properties were assessed under their names respectively. Mill A. had been vacant and unused for three years, and was assessed at the value of \$25,000. Nothing was asked in respect of Mill B. The petitioners by their petition asked that the taxes, or a substantial part thereof, on Mill A. for 1897 should be remitted.

By s. 67 of the Consolidated Assessment Act, 1892, 55 V. c. 48, "the Court shall also, before or after the 1st day of July, and with or without notice, receive and decide upon the petition from any person assessed for a tenement which has remained vacant during more than three months in the year for which the assessment has been made . . . and the Court may, subject to the provisions of any by-law in this behalf, remit or reduce the taxes due by any such person, or reject the petition ; and the council of any local municipality may, from time to time, make such by-laws, and appeal or amend the same."

The objection of the Court of Revision was that no by-law had been passed on the subject, and, in their opinion, they could not act under the section until a by-law had been passed. There was to be another session of the Court for the year 1897.

*D. L. McCarthy*, for the applicants.

No one appeared to show cause, although all the members of the Court of Revision and the solicitor for the town of St. Catharines were served with notice of the application.

FERGUSON, J.—Mill A. is a tenement, and has been unoccupied more than three months of the year 1897. I am of the opinion that the Court of Revision is obliged to receive and decide upon the petition, and that the fact that the municipality has not passed any by-law on the subject does not relieve the Court from the performance of this duty. If a by-law on the subject existed, the action of the Court would be subject to the provisions of it ; but when there is no such by-law, the action of the Court will simply be independent of any such provisions ; their duty is to receive and decide upon the petition. The Court of Revision stands in a position such as that of a public officer having a public duty to perform, and the petitioners are citizens having an interest in the performance of that duty. I am of the opinion that the affidavit of Mr. Collier—unanswered—shows a sufficient demand and refusal. I think the order for the mandamus should go.

[STREET, J., 27TH NOVEMBER, 1897.]

## CONN v. SMITH.

*Bankruptcy and insolvency—Advances by bank to insolvent—Pledge of goods as security—Invalidity of—Bank Act—Claim by creditor to recover from bank moneys arising from sale of goods—58 V. c. 23, s. 1 (O.)—"Invalid against creditors"—Retroactivity of statute—Warehouse receipts—Exchange of securities—53 V. c. 31, s. 75, s.-s. 2 (D.)—Collateral security—Mortgage—Declaration—Parties.*

Action by a simple contract creditor of the defendant Smith to recover judgment for a debt, and on behalf of all creditors of Smith to recover from the defendants the Merchants' Bank of Canada certain moneys and properties of Smith alleged to have come to their hands by means of breaches of the Bank Act. Thirteen transactions were attacked. Eleven of them related to pledges of hay and grain made by Smith to the bank, in or before 1898, to secure advances. The plaintiff alleged that in these transactions there had been no contemporaneous advance, and that the pledge, whether in the form of a bill of lading or a warehouse receipt or a direct pledge, was invalid under s. 75 of the Bank Act, 58 V. c. 31. It was not disputed that the Bank had, before action, disposed of the hay and grain, and received the proceeds, and applied them in satisfying moneys advanced to Smith.

The plaintiff claimed, as one of the creditors of Smith, who had ceased before this action to meet his liabilities, to be entitled to obtain the moneys so received by the bank, and to apply them in payment of creditors' claims, under s. 1 of 58 V. c. 23 (O.), which is as follows: "In case of a gift, conveyance, assignment, or transfer of any property, real or personal, which in law is invalid against creditors, if the person to whom the gift . . . was made shall have sold or disposed of the property or any part thereof, the money or other proceeds realized therefor by such person may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift . . . was made, and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the said debtor, but shall exist in favour of all creditors of such debtor, in case there is no such assignment."

The evidence showed that there was sufficient pressure by the bank to exclude the intent of fraudulent preference in the transactions in question.

*Held*, that the words "invalid against creditors" should be treated as limited to transactions invalid against creditors *qua* creditors, and not as extending to transactions declared invalid for reasons other than those designed to protect creditors.

*Held*, also, that the Act of 1895 did not apply because the money had been received by the bank before it was passed, and that it was not retroactive, as was argued, because it conferred a right which had no previous existence, and did more than merely make an alteration in procedure.

The next question concerned a quantity of hops still remaining unsold, which were held for the bank in a warehouse, under a receipt given by one Hiscox, the lessee of the warehouse. The defendant Smith was in the habit of buying hops from time to time, and giving the bank his own warehouse receipts or direct pledges for the purpose of raising money to pay for them. Then, at the request of the bank, he constituted his bookkeeper, Hiscox, his warehouseman, and Hiscox issued warehouse receipts to the bank in substitution for the securities or receipts theretofore held by the bank, there being no further advance made when the new securities were given. By s.-s. 2 of s. 75 of the Bank Act, the bank, on receipt of the goods, may store them and take a warehouse receipt for them without forfeiting any existing right.

*Held*, that this exchange of securities should be treated as authorized under that sub-section.

The remaining question related to the rights of the bank under a mortgage upon a block of brick buildings made by Smith to one Steele, and assigned to the bank. The plaintiff asked for a declaration that the advances by the bank upon this mortgage, or some part thereof, were contrary to the Bank Act, and that the property was free from the mortgage, or that the amount received under it might be paid into Court and applied in payment of the claims of Smith's creditors.

*Held*, that no such declaration should be made in the absence of Steele, who was liable to the bank as indorser of a promissory note of Smith for \$8,000, collateral to the mortgage.

*Aylesworth*, Q.C., for the plaintiff.

*McCarthy*, Q.C., for the defendants.

**In the County Court of the County of York.**

[McDOUGALL, Co. J., 2ND NOVEMBER, 1897.]

**HARRIS v. CANADA PERMANENT L. & S. CO.**

*Landlord and tenant—Distress—Exemptions—R. S. O. c. 148, s. 27—55 V. c. 31—Interpretation.*

An application by the plaintiff, under the circumstances set out below, for an injunction.

*A. F. Lobb*, for the plaintiff.

*R. B. Beaumont*, for the defendants.

McDOUGALL, Co. J.—This is an application for an injunction to restrain the sale of certain goods seized under a landlord's warrant. The parties are agreed that I shall determine the whole matter summarily, as all facts necessary to a conclusion have been put in before me on this motion, and the plaintiff's rights depend entirely upon the construction to be placed on the language of s. 27 of R. S. O. c. 148, as amended by 55 V. c. 31.

As amended the section reads as follows :

“The goods and chattels exempt from seizure under execution shall not be liable to seizure by distress by a landlord for rent in respect of a tenancy created after the first day of October, 1887, except as hereinafter provided ; nor shall such goods be liable to seizure by distress by a collector of taxes accruing after the said first day of October, 1887, unless they are the property of the person actually assessed for the premises, and whose name also appears upon the collector's roll for the year as liable therefor : *Provided that in the case of a monthly tenancy such exemption shall only apply to two months' arrears of rent.*”

The question is, what do the words of the amendment, “provided that in the case of a monthly tenancy such exemptions shall only apply to two months' arrears of rent,” mean ?

The law of landlord and tenant, as it stood before the passage by the Legislature of s. 27 of R. S. O. c. 148, allowed the

landlord under his warrant of distress to take all goods found on the demised premises. This was the harshness of the common law, and it had prevailed for a long series of years. The tenant had no exemption save that the landlord could not take the beast of the plough at work, articles in actual use at the time of seizure, and certain similar exceptions, allowed, it is believed, solely because the taking under certain circumstances might lead to a breach of the peace. The more humane tendencies of modern times were expended in many directions, and for many years, before the harsh law in favour of the landlord was approached, and it was not until 1887, by 50 V. c. 23, s. 1, that our legislators made a sweeping change, and placed all tenants whose tenancy commenced after 1st October, 1887, upon the same footing as other debtors, and declared that the goods and chattels exempt from seizure under execution should not be liable for seizure under distress for rent. This broad remedial enactment continued in force until 1892, when the amendment which is now under consideration in this case was made, but purported to apply only to monthly tenancies.

In the present case the tenancy was a monthly one. There was about eighteen months' rent in arrear at the date of the seizure. The goods seized, it is admitted, are goods which would be exempt from seizure under execution. Are they exempt from seizure under the provisions of the statute, or if not, what are the tenant's rights?

The first point to be noticed in the confusing language of the proviso is that it states that in case of monthly tenancies "*such exemption shall only apply to two months' arrears of rent.*" Now, the exemption spoken of in s. 27 does not apply to rent, but to goods. There is no such thing as an exemption applying to arrears of rent. The original section, remedial and clearly expressed, gives to every tenant the right to claim all his goods as exempt from distress which would be exempt under execution. Has the proviso of 1892 cut down, by clear and intelligible language, this clearly expressed right? Does the clause mean that a tenant can claim for his goods exemption only where he is exactly two months in arrear with his rent,—that if he be only one month in arrear, or three months in arrear, he can claim no exemption at all? It is argued that, as the proviso takes away from monthly tenants a right which is not affected in the case of

tenants holding by the week or quarter or year, such an intention must be expressed in most clear and positive language, otherwise it will not be inferred that the Legislature intended to deal so hardly with a particular class of tenants as distinguished from all other tenants.

Again, if it is meant that to the extent of two months' arrears, *i.e.*, one month or two months, but not exceeding two months, the tenant is to have the benefit of the original exemption of certain of his goods from seizure, does it mean that when his arrears of rent exceed two months he is to have no exemption whatever? In other words, is a monthly tenant, in arrear for more than two months, to be viewed as if still under the old common law, and liable to have the bed taken from under his sick wife or child, and even his own clothing or those of his wife and children taken, if not in actual use at the time of the seizure? Or does it mean, though I see no authority in the language for this latter view, that he is entitled to claim as exempt goods to the value of two months' rent. Or does it mean that all the goods may be sold and he entitled to claim out of the proceeds money to the extent of two months' rent?

Is it possible to put a fair and reasonable interpretation upon the language of the Legislature which can be given effect to? I cannot, I confess, gather the intention. If I am unable to ascertain with reasonable clearness the intention from the language used, I am not allowed to supply a meaning or guess at it. As said by Grove, J., in *Richards v. McBride*, 8 Q. B. D. 152, "We cannot assume a mistake in an Act of Parliament. If we did so, we should render many Acts uncertain by putting different constructions upon them according to our individual conjectures. The draftsman of the Act may have made a mistake. If so, the remedy is for the Legislature to amend it."

I am unable to say from the language used in this proviso what limitations the Legislature intended to put on a monthly tenant's right to exemption for certain of his goods when sought to be taken by a distress for rent. Rather than guess at its meaning, it is better to say that the words have no meaning at all.

I must, therefore, hold that this tenant's goods were exempt from seizure at the time of this distress, and that the plaintiff is entitled to his order for an injunction.



## MANITOBA.

## In the Queen's Bench.

[FULL COURT, 1ST DECEMBER, 1897]

## GREY v. MANITOBA AND NORTH-WESTERN R. W. CO.

*Judgment debtor—Examination of, abroad.*

An appeal from the decision of TAYLOR, C.J., *ante* 384, was dismissed with costs.

In Rule 738 of the Queen's Bench Act, 1895, the examination of an officer of a corporation is to be taken before any of the officials referred to in the preceding Rule, and this would seem to limit the examination to one that is to be taken before one of the officials specified in Rule 732.

[6TH DECEMBER, 1897.]

## BERTRAND v. CANADA RUBBER CO.

*Bankruptcy and insolvency—Fraudulent preference—"Insolvent"—"Unable to pay debts in full"—Meaning of—Preferential security—Pressure.*

An appeal from the decision of KILLAM, J., *ante* 272, was dismissed with costs.

The evidence justified the finding of the trial Judge that the debtor was insolvent, and that the mortgage was given with intent to prefer the creditor to whom it was given.

[KILLAM, J., 17TH NOVEMBER, 1897.]

## DIXON v. HEATLY.

*County Court—Judgment summons—Necessaries—Action by assignee of debt—R. S. M. c. 38, s. 293.*

County Court appeal.

The plaintiff sued the defendant for the amount of an account which had been assigned to him for the purpose of collection, and obtained judgment therefor. The plaintiff then issued a judgment summons under the County Courts Act, R. S. M. c. 88, s. 293, which provides that any party having an unsatisfied judgment "for the payment of any debt incurred for necessities" may procure a judgment summons.

On the return of the summons, it was objected by the defendant that the remedy by judgment summons was open only to a tradesman who had supplied actual necessities, and could not be taken advantage of by an assignee of the debt.

The County Court Judge held the objection valid, and discharged the summons.

The plaintiff appealed to a Judge of the Queen's Bench.

The appeal was allowed, and the summons referred back to the Judge of the County Court for hearing.

*Held*, that s. 293 of the County Courts Act was not intended only to operate as a special remedy to the party furnishing the necessities. The language is wide and general. The debt was incurred for necessities. Persons to whom such debts are due are authorized by law to assign them, and their assignees are entitled to recover judgment therefor. The object of the law seemed to be to subject to the inquisitorial process and to its consequences only those who have had their necessities supplied. There seemed no reason for inferring an intention not expressed in the statute. The plaintiff and the claim came within the terms of the statute.

*T. G. Mathers*, for the plaintiff.

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## NORTH-WEST TERRITORIES

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In the Supreme Court.

NORTHERN ALBERTA JUDICIAL  
DISTRICT.

IN CHAMBERS.

[ROULEAU, J., 28TH OCTOBER, 1897.]

MONGENAIS v. HENDERSON.

*Costs—Taxation—Counsel fees—Discontinuance—Notice of trial.*

An appeal by the defendant Henderson against the disallowance by the clerk, on taxation of costs, of fees for brief, including counsel fee advising on evidence and fee with brief at trial.

*P. McCarthy*, Q.C., for the plaintiffs.

*James Short*, for the defendant Henderson.

ROULEAU, J.—On the 23rd June, 1897, the plaintiffs obtained an order under s. 154, C. J. O., “that plaintiffs be at liberty to set this cause down for trial at the next sittings of this Honourable Court, commencing on Tuesday, the 2nd day of November, 1897 . . . and that the advocates for the plaintiffs do give the advocates for the defendants eight days’ notice of such trial, after which the cause may come on to be heard.”

On the 22nd October the plaintiffs, with the defendant Henderson’s consent, procured an order to discontinue as against him, “on payment of his costs forthwith after taxation.”

On taxation of costs all items respecting brief, counsel fee advising on evidence, and counsel fee with brief at trial, were disallowed by the clerk, on the ground that the notice of trial provided for in the order above recited had not been given.

On appeal it was contended for the plaintiffs that the cause had not been set down, and that the defendant Henderson was

not entitled to costs of brief until after notice of trial given : *Freeman v. Springham*, 82 L. J. C. P. 249 ; *Cooper v. Boles*, 5 H. & N. 188.

For the defendant it was contended that the practice in the North-West Territories in this matter differed from that in England. The order setting down virtually covered the English notice of trial and order entering.

The English practice is set out in Marginal Rules 435, 436, 439, and 444. Our procedure is laid down in C. J. O., s. 154, which provides :—

“ After the close of the proceedings, the plaintiff may at any time, on notice to the defendant, apply to the Judge for and obtain an order *setting down* the cause for trial . . . at such time and place as the Judge shall direct . . . But if such application be not made within three months after the close of the pleadings, the defendant, on notice, may apply for and obtain an order to set the cause down for trial . . . ”

It is quite clear that the practice in the Territories with regard to setting a cause down for trial differs from the practice in England in that behalf. With us the order setting down takes the place of the English notice of trial and order entering. No importance is to be attached to the fact that in the order setting down provision is frequently made for notice of trial before hearing. This notice is a mere matter of courtesy, and the order is not impaired if no clause with regard to it be inserted. The date of the opening of Court is fixed, and litigants must be ready for trial on that day.

The defendant is, therefore, entitled to tax the items claimed except fee with brief at trial.

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NOTE:—Where the number of the page only is mentioned, the reference  
is to the CANADIAN LAW TIMES Occasional Notes for 1897.

Occ. N.—*Canadian Law Times Occasional Notes.*

S. C. R.—*Supreme Court (of Canada) Reports.*

Ex. C. R.—*Exchequer Court (of Canada) Reports.*

A. R.—*Ontario Appeal Reports.*

O. R.—*Ontario Reports.*

P. R.—*Ontario Practice Reports.*

N. S. Reps.—*Nova Scotia Supreme Court Reports.*

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